1 Supreme Court of the State of Michigan.

Return to Writ of Error.

STATE OF MICHIGAN:

In the Circuit Court for the County of Berrien.

MUSSELMAN GROCER COMPANY, Plaintiff,
vs.
KIDD, DATER & PRICE COMPANY, Garnishees of Frank B. Ford, Defendant.

Bill of Exceptions.

At a session of said Court held at the court house in the city of St. Joseph, in said county, on the 14th day of March, A. D. 1907, this cause came on for trial before the Hon. Orville W. Coolidge, Circuit Judge, and a jury duly impaneled and sworn.

Plaintiff to maintain the issue on its part called as a witness William W. McCracken, who testified that he was deputy county clerk of the county of Berrien; that he had with him the files in the case of Musselman Grocer Company vs. Frank B. Ford, and against
2 both garnishees, the Kidd, Dater & Price Company and the Wilson Hardware Company, which files were offered and received in evidence, and from which it appeared that the summons in the principal case was issued July 14, 1906; that the summons was returned duly served, July 16, 1906; that the principal defendant afterwards appeared by Cady & Andrews, his attorneys, and pleaded the general issues. That on said July 14, 1906, affidavits in garnishment were filed claiming that the garnishee defendant was indebted to the principal defendant and that it had property and effacts in its hands and under its control belonging to the said principal defendant. That thereupon a writ of garnishment in the usual form was issued against said Kidd, Dater & Price Company returnable on the 6th of August, 1906; which writ was duly served; that said garnishee on July 17, 1906, filed its disclosure in writing denying that it was indebted to the said Frank B. Ford, and denying that it had any property, money, goods, chattels, credits or effects in its hands or under its control belonging to the said Frank B. Ford.

It further appeared that the plaintiff demanded an examination of the garnishee in open court and that afterwards on the 6th day of August, 1906, George R. Dater, treasurer of the said garnishee defendant, was so examined in open court; his disclosure on said examination was introduced by the plaintiff at this trial and is in substance as follows:

My name is George R. Dater. I am treasurer of the Kidd, Dater & Price Company. I am acquainted with Frank B. Ford, of Berrien Springs. In the month of June, 1906, I bought from Frank

B. Ford his stock of groceries and fixtures in that part of the store. The transaction was on May 23, 1906. An inventory was taken of the stock at that time. The inventory value was $2126.82; that is what was paid for it, 90c on the dollar; 90c of the inventory price. That inventory included groceries and fixtures.

Q. Did it take all of his stock and fixtures except his hard-
3 ware stock, and fixtures used with the hardware?

A. No, he sold a part of the stock before and part of it after.

The COURT: They sold part of the stock before?

A. No, he runs a department store and there was a meat market connected, and hardware and implements and buggies and such things as that.

Q. What part had been sold before you purchased the grocery stock and fixtures?

A. The implements, buggies and harness and one thing and another carried in that department.

Q. When was the inventory completed?

A. I paid—I finished paying for it May 31; it was completed a day or two before that. I paid for it with check and part of my account. The account was $415.45 and a check for $100.00 on May 23, and the balance $1623.69 on May 31. I didn't before paying for it demand or receive from Mr. Ford a sworn statement of the list of his creditors and amount he owes each of them. I didn't send notices to any of Mr. Ford's creditors before paying for the stock that we were about to buy. The inventory was taken by Mr. Ford's clerks up there and John Gaynor and myself. One of the clerk's names was Wilson.

Q. You understood at that time, did you not, that the stock was not all paid for?

A. I didn't know anything about it.

Q. Did you not ask Mr. Ford at that time if the stock was all paid for?

A. I might have said something about it. I don't know but he told me it was all paid for, he said it was all paid for or he had money to pay for it something like that, I don't remember the conversation. I would not say just exactly the words he used.

Q. Didn't Ford at that time tell you it was not all paid for?
4 A. No I think I asked Mr. Wilson if it was paid for and he said he didn't know just how it was or how much he owed.

Q. Did you not ask Ford at or about the time you were ready to pay him the balance what he was going to do about his unpaid bills?

A. There was something said about what he was owing and he said he had plenty of money to pay them with and he was going to pay for them.

Q. Did you not at or about the time you paid him the last of his money, say to him, "Under the bulk law it is necessary that all bills be paid before I can pay you, or that you guarantee me they will be paid," or words to that effect?

A. I said there was some such law but I didn't understand they should be notified, being he was not selling out he said he didn't think he had to.

Q. This matter was talked over at that time?

A. There was something said about it, yes, sir.

Q. As I understand you, you took none of the steps provided for by the statute?

A. No, sir. I didn't notify anyone. This transaction did not entirely balance our account. There was $12.30 remaining due to us. There was a dispute about a barrel of New Orleans molasses; he would not accept it there over at the depot and they let it fall and break and it still lays there. This sum was for the price of a barrel of New Orleans molasses.

The checks were here read into the record as follows:

"Farmers & Merchants Bank Benton Harbor, Michigan, May 23rd. Pay to Frank Ford one hundred dollars. Kidd, Dater & Price Company. George Dater, Treasurer." On the back endorsed Frank B. Ford and Dix & Wilkinson.

There is one dated May 31 and reads as follows:

"Pay to the order of F. B. Ford $1623.69. (Signed) Kidd, Dater & Price Company. George Dater, Treasurer." This is endorsed by Frank B. Ford and Dix & Wilkinson.

5 Cross-examination of witness GEO. R. DATER:

Said witness testified as follows: That the principal defendant Frank B. Ford was operating a department store in the village of Berrien Springs and was indebted to my firm in the amount of $415.45. These departments consisted of hardware, grocery department, meat market and furniture department, and there were buggies and machinery in another department.

Q. How came you to buy out the grocery stock?

A. He had been advertising to sell for quite a while and I went over. There happened to be a couple of young men over there that would like to get into business and I thought if we could get hold of it we would sell them some goods and it would be a good investment for a little money. I took the stock at 90 cents on the dollar. An inventory was taken by me and Ford and my bookkeeper, John Gaynor, and Wilson, one of the clerks there. That inventory was taken at cost less 10 per cent. That was a good price for it, more than the stock would sell for as a general thing. It amounted to something over $2100.00. At that time I gave a check for $100.00 the day I made the bargain with them. Then when we came to settle up I deducted what he owed us and gave him a check for the balance. There was a dispute about a barrel of molasses and that was simply left out.

Q. What was left when you had bought out what you did buy?

A. The meat market and the hardware stock.

Q. About how extensive a hardware stock was that?

A. Probably five or six thousand dollars.

Q. And the meat market?

A. I should think between $800.00 and $1000.00. I don't know just exactly.

Q. So that when you bought out this property there remained a stock of five or six thousand dollars worth of hardware?

6 A. Yes, sir.

Q. And somewhere between eight hundred and a thousand dollars in the meat market?

A. Yes, and there was still the furniture stock there. I don't know the value of the furniture stock that was in a part of the store; these were all separate departments but they were all in the same building. It is what is called a department store. Mr. Ford had sold his buggies and implements before that. I knew he had sold but I didn't know whether he had got all of the money; at that time I bought this out I didn't have any knowledge of Ford's indebtedness. My purpose in buying was just for an investment. The collection of the amount he owed had nothing to do with it.

Q. Was there any purpose on your part to hinder or defraud or delay Ford's creditors?

A. No sir.

Q. Did he give you any intimation or say anything that led you to believe he had such purpose?

A. No sir, he did not. It was understood that this was to be a cash transaction.

The COURT: Were the goods delivered to you? The transaction took place May 23 and you didn't make a payment until May 31.

A. May 23rd, when I bargained for the stock and gave him $100.00 to bind the bargain and then took an inventory of the stock I was pretty busy at home and didn't get there until next week to finish paying him up, but he had delivered the stock; the boys took possession of it I think on Monday, and it was Wednesday I paid him. The men who took possession for me were named Graham and Edson; they conducted the business in the same place; the stock was not moved at all, and they are still conducting it as far as I know, conducting it for us, that is for Kidd, Dater & Price Company, so that the goods except such as may have been sold in the usual course of trade are there now. I have known Mr. Ford a few years.

7 Q. Was he the owner of any real estate?

A. He owned a farm I understood, and the buildings he was occupying there; a farm near Berrien; as I understood him he still owned it at the time I bought the grocery stock. He owned the building there where all his business was transacted; it is a brick building two stories high with two rooms; I think about 50 or 60 feet wide maybe 100 feet deep; it is a big building.

Q. Have you any idea of the value of the real estate?

A. I don't know just the value of it in that town, I should judge $6000.00 or $7000.00 maybe I mean by that the building and the land it stands on. I don't know about the size of this farm, it is either 20 or 40 acres.

Redirect examination by Mr. CORWIN:

Q. You say he owned this building at the time you bought the stock from him?

A. I don't say that he owned it. He either owned it or might have sold it just before I bought.

Q. Is it not a fact he sold it in February previous?

A. I could not give the date, but the farm he sold after I bought I am pretty certain.

It is admitted by counsel for plaintiff that Ford afterwards sold out his stock of hardware to the Wilson Hardware Company for about $4100.00 and that it gave notice provided for by the bulk law including notice to the plaintiff in this case. Notices were sent out by Wilson Hardware Company who bought the hardware; that they had inventoried the hardware and fixtures at $4124.62 and was going to pay $3883.58 in cash and $161.93 November 21, 1906. Notice by Wilson Hardware Company was dated June 18.

Witness further said: After the sale to us the meat market was sold. Lybrook and Pennell bought the meat market; the carriages and implements had been sold before they purchased. The furniture stock had not been sold.

8 After the reading of the foregoing written examination of Mr. Dater, the witness, Mr. McCracken further testified that the judgment against the principal defendant Frank B. Ford, was entered November 16, 1906, for the sum of $435.92, that the amount of cost taxed was $31.15, making a total of $467.07.

Witness further stated that garnishment proceedings had also been had by plaintiff against the Wilson Hardware Company as garnishees of Frank B. Ford; that judgment had been rendered against the Wilson Hardware Company for $161.93 with costs taxed at the sum of $10.00. Counsel for the plaintiff admitted that the sum of $151.93 had been paid into court by the Wilson Hardware Company which should apply on the judgment against the principal defendant, which would leave a balance of $315.14 due the Musselman Grocer Company. It was admitted by counsel for both parties that the remainder of the judgment with interest at the time of the trial would amount to $320.39.

Counsel for plaintiff offered in evidence the judgment in the principal suit.

Cross-examination of witness W. B. M'CRACKEN:

Witness testified. I have here the record of the suit of Dix & Wilkinson against the same principal defendant and against the same garnishee defendant, Kidd, Dater & Price Company. It further appeared from the cross-examination of this witness that Dix & Wilkinson obtained judgment for the sum of $1027.61 against the principal defendant, Frank B. Ford, on November 26, 1906; that on November 26, 1906, a writ of garnishment was issued at the suit of Dix & Wilkinson against Kidd, Dater & Price Company as garnishees in the usual form of garnishment after judgment,

which writ was returnable December 11, 1906. That on December 7, 1906, the defendants filed disclosure denying all liability in any form and that the records did not show that the judgment
9 in favor of Dix & Wilkinson had been in any way satisfied.

Defendant here offered in evidence a petition to the U. S. District Court for the Western District of Michigan, of Samuel A. Maxwell and others, praying that the said Frank B. Ford be adjudged to be a bankrupt within the meaning of the bankruptcy laws of the United States, which petition was admitted in evidence.

A copy of said petition is hereto annexed and marked exhibit "A."

Both parties here rested.

Mr. VALENTINE: I want to raise two or three questions here, and they are that these proceedings, if they hold at all, are under act No. 223 of the session laws of 1905 of this state, entitled "An Act to regulate the sale, transfer, and assignment of stocks of goods, merchandise and furniture in bulk." My point is, first, by the terms of this act, if it is a valid enactment, garnishment proceedings are not the proper remedy and such proceedings do not lie.

The COURT: Has not the constitutionality been passed upon?

Mr. VALENTINE: The bare question of constitutionality of the law has been passed upon unfavorably by our Supreme Court. If garnishment will lie, or whatever proceedings will lie, if any under this, it is for the benefit of all the creditors of the principal defendant pro-rata, and not for the benefit of the man who happens to get ahead. I am going to make use of this hereafter. That is my only purpose now.

That the act under which this action is brought violates section 32 of Article VI. of the Constitution of this State which provides that no person shall be deprived of life, liberty or property without due process of law.

Again, that it violates section 1 of the 14th amendment to the Federal constitution which provides that no state shall make or enforce any law which shall abridge the privileges or immuni-
10 ties of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

That act is void because it creates an unreasonable restraint upon trade.

Next, that it is void, because it attempts to make ordinary business transactions which are presumably honest conclusively dishonest, fraudulent and void. In other words, that it don't leave it an open question to be decided at all by anybody. That the act is void because it is not a valid exercise of the police powers of the State.

That the act under which this garnishment suit is brought is unconstitutional and void, because it makes the purchaser who does not conform to the provisions of the act accountable to the creditors of the seller without regard to the honesty or good faith of the transaction.

Also that it is unconstitutional because it attempts to make the purchaser who conforms to the provisions of the act not accountable

to creditors, no matter how dishonest or fraudulent the transaction may have been and although the sale may have been made with the intent and design to cheat and defraud the creditors of the seller.

There is another matter I wish to put in the form of requests for instructions. I ask your honor to instruct the jury——

The COURT (interrupting): You may read those. I may conclude to take this case under advisement. There is one important question to be considered. I suppose it is all a matter of law?

Mr. VALENTINE: It is all a matter of law except possibly—all a matter of law. The request is that if the jury find from the evidence that after the sale in question to Kidd, Dater & Price Company, the seller, Frank —. Ford, was still the owner of goods to the
11 value of five thousand dollars or more, then the garnishee Kidd, Dater & Price Company cannot be held to the plaintiffs the Musselman Grocer Company, and if you so find, your verdict should be for the defendant.

The COURT: In other words that he hadn't sold out the whole property?

Mr. VALENTINE: He had not. He had goods to the value of six or seven thousand dollars besides a considerable quantity of real estate.

The COURT: I would like to ask whether the constitutionality of this Act was fully argued in the Supreme Court?

Mr. CORWIN: Yes, and it is reported in the 108 Northwestern, page 1090, the question of constitutionality fully. I don't know that the federal question has been raised but the state question has.

Mr. VALENTINE: The Supreme Court of this state has held the law constitutional but there was no question raised under the Federal constitution. And I may say that it was admitted there that garnishment proceedings would lie, counsel admits that there was no question of that kind before the Court at all. That is all I have to say. The facts are all here undisputed.

Mr. CORWIN: That being their case we move the Court to direct a verdict for the plaintiff for the amount stated which has been given in evidence.

The COURT: I think I will hold this matter until next week. I mean to look over this decision in reference to the constitutionality of the law.

Mr. CORWIN: That will be the course?

The COURT: Call back the jury or direct a verdict.

Mr. CORWIN: Our exceptions can be taken now as I do not want to come back.

The COURT: Oh, yes.

Mr. VALENTINE: I will agree that that may be done if your honor does that, if it should result in that way.

The said Circuit Judge directed the jury to render a ver-
12 dict for the plaintiff and thereupon the jury under the direction of said Court rendered a verdict for the plaintiff and against the garnishee defendant for the sum of $320.39 and costs to be taxed. And thereupon judgment was entered for the plaintiff and against the garnishee defendant for the sum aforesaid.

Because of the matters aforesaid given in evidence do not appear by the record of said trial and verdict, the counsel for defendant within the time allowed for that purpose has prepared this bill of exceptions showing the exceptions of said defendant by said Circuit Judge and has requested said Judge to sign this bill of exceptions containing the several matters aforesaid pursuant to the statute in such case made and provided.

It is further certified that the Court deemed it necessary to a full understanding of the questions of law involved that such parts of the evidence as are herein set forth by question and answer should be so set forth.

And it is further certified that the foregoing contains in substance all the evidence given upon the trial. It is also certified that the assignmen-s of error hereto attached were presented to him at the time of the settlement of this bill of excep-ions and thereupon said Circuit Judge at the request of counsel for defendant has signed this bill of exceptions this 21st day of June, A. D. 1907.

ORVILLE W. COOLIDGE,
Circuit Judge.

EXHIBIT B.

To the Hon. Loyal E. Knappen, Judge of the District Court of the United States for the Western District of Michigan, Southern Division:

The petition of Samuel A. Maxwell, Edward E. Maxwell, and Charles E. Maxwell, co-partners doing business as S. A. Max-
13 well and Company of Chicago, Illinois, and Pitkin & Brooks, a corporation organized and existing under the laws of the state of Illinois, and the Art Stove Company, a corporation organized and existing under the laws of the state of Michigan, of Detroit, Michigan, and Scotten Tobacco Company, a corporation organized and existing under the laws of the state of Michigan, of Detroit, Michigan.

Respectfully shows: That Frank B. Ford of Berrien county Michigan, has for the greater portion of six months next preceding the date of filing this petition, remained or had his domicile at Berrien Springs in said County of Berrien, and State of and District aforesaid, and owes debts to the amount of $1000.00.

That your petitioners are creditors of said Frank B. Ford, having provable claims amounting in the aggregate in excess of securities held by them to the sum of five hundred dollars ($500.00).

That the nature and amount of your petitioners' claims are as follows:

That the consideration for all the debts and claims owing to above petitioners from said Frank B. Ford are for goods, wares and merchandise sold and delivered to him, said Frank B. Ford, at his special instance and request, and are in the form of open accounts in amounts as follows:

Claim of S. A. Maxwell & Co. is in amount.....	$161.53
Claim of Pitkin & Brooks is in amount.....	112.24
Claim of Art Stove Company is in amount.....	251.00
Claim of Scotten Tobacco Company is in amount.....	15.18
	$539.95

And your petitioners further represent that said Frank B. Ford is insolvent and that within four months next preceding the date of this petition the said Frank B. Ford committed an act of bankruptcy in that he did while insolvent heretofore to-wit: on the six-
14 teenth day of November, A. D. 1906, permit the Musselman Grocer Company, a Michigan corporation, to obtain a judgment in the Circuit Court for the County of Berrien, State of Michigan, in said Western District of Michigan, the same being a court of record, against him, the said Frank B. Ford, in a suit therein pending, wherein said Musselman Grocer Company was plaintiff and said Frank B. Ford was defendant for the sum to-wit: Four hundred thirty-five and 95-100 dollars damages and $31.15 costs taxed therein, and did while insolvent heretofore to-wit: on said 16th day of November, A. D. 1906, permit said Musselman Grocer Company to obtain a judgment in said Circuit Court for the County of Berrien against Thomas H. Horan and A. E. Wilson, co-partners doing business under the firm name of Wilson Hardware Company, in a suit therein pending wherein said Musselman Grocer Company was plaintiff and said Frank B. Ford was principal defendant, and said Horan and Wilson, co-partners as aforesaid, were garnishee defendants of said Frank B. Ford for the sum of to-wit: one hundred sixty-one and 93-100 dollars, and the said Frank B. Ford did, while insolvent theretofore, to wit: on the 7th day of December, A. D. 1906, permit said Thomas H. Horan and A. E. Wilson, co-partners as aforesaid, to pay the clerk of said Circuit Court for the County of Berrien the sum of to-wit: one hundred sixty-one and 93-100 dollars in full satisfaction of said judgment against said Horan and Wilson, co-partners as aforesaid, as garnishees of said Frank B. Ford and as part satisfaction of the judgment of said Musselman Grocer Company against Frank B. Ford; and said Frank B. Ford did while insolvent heretofore, to-wit: on the 7th day of December, A. D. 1906, permit said Clerk for the Circuit Court for the County of Berrien to pay and said clerk did pay to said Musselman Grocer Company as part satisfaction of the aforesaid judgment, the sum of, to-wit: one hundred fifty-one and 92-100 dollars of the money so received by him as aforesaid. And he,
15 said Frank B. Ford, while insolvent did thereby suffer or permit the said Musselman Grocer Company, a creditor of him, the said Frank B. Ford, to obtain a perference through legal proceedings, he, the said Frank B. Ford, not having at least five days before the final disposition as aforesaid of the property affected by such perference, vacated or discharged such perference.

Wherefore your petitioners pray that service of this petition with subpœna may be made upon Frank B. Ford as provided in the Acts

of Congress relating to bankruptcy and that he may be adjudged by the Court to be a bankrupt within the purview of said Acts.

S. A. MAXWELL AND COMPANY,
(By CHARLES W. STRATTON,
Their Attorney);
PITKIN & BROOKS,
(By CHARLES W. STRATTON,
Their Attorney),
THE ART STOVE COMPANY,
(By CHARLES W. STRATTON,
Their Attorney);
SCOTTEN TOBACCO COMPANY,
(By CHARLES W. STRATTON,
Their Attorney),
Petitioners.

STRATTON & EVANS,
Attorneys for Petitioners.

Business address, St. Joseph, Michigan.

UNITED STATES OF AMERICA,
Western District of Michigan,
Southern Division, ss:

Charles W. Stratton, of the City of St. Joseph, Berrien County, Michigan, being duly sworn, deposes and says that he is one of the attorneys for S. A. Maxwell & Company, Pitkin & Brooks, The Art Stove Company and the Scotten Tobacco Company, the petitioners named in the foregoing petition in whose behalf he makes this affidavit, and who signed the name of said petitioners to said petition, he having authority so to do, and having more of a personal knowledge of the facts set forth in said petition than said petitioners themselves; and this deponent does hereby make solemn oath that the statements set forth in the foregoing petition subscribed by the above petitioners by this deponent as one of their attorneys as aforesaid are true.

CHARLES W. STRATTON.

Subscribed and sworn to before me this 1st day of February, 1907.
HELEN C. CLARKE,
Notary Public, Berrien County.

My commission expires Feb. 1st, 1908.

UNITED STATES OF AMERICA,
Western District of Michigan,
Southern Division, ss:

I, Chas. J. Potter, Clerk of the District Court of the United States for the Western District of Michigan, do hereby certify that the foregoing is a true and compared copy of the creditors' petition for adjudication of bankruptcy against Frank B. Ford. In the proceedings of said Court in said entitled matter and of the whole thereof.

Witness my official signature and the seal of said court at Grand Rapids this 28th day of February, in the year of our Lord one thousand nine hundred and seven.

[SEAL.] CHAS. J. POTTER,
Clerk U. S. District Court, West Dist. Michigan.

16 STATE OF MICHIGAN:

In the Circuit Court for the County of Berrien.

MUSSELMAN GROCER COMPANY, Plaintiff,
vs.
KIDD, DATER & PRICE COMPANY, Garnishees of Frank B. Ford, Defendant.

Assignments of Error.

And now comes the said garnishee defendant, Kidd, Dater & Price Company, by G. M. Valentine, its attorneys, and says that in the record and proceedings in this case, also in the giving of the judgment therein, there is manifest error in this:

I.

The Court erred in holding that proceedings in garnishment is the proper remedy for the enforcement of Act No. 223 of the Session Laws of 1905 of the State of Michigan.

II.

The Court erred in refusing to instruct the jury as requested by defendant, which request is as follows:

"If the jury find from the evidence that after the sale in questior to Kidd, Dater & Price Company, the seller, Frank B. Ford, was still the owner of goods to the value of five thousand dollars or more, then the garnishees, Kidd, Dater & Price Company, cannot be held to the Plaintiff, the Musselman Grocer Company, and if you so find, your verdict should be for the defendant."

III.

The Court erred in directing the jury to render a verdict in favor of the plaintiff and in refusing to direct a verdict for the defendant.

IV.

The Court erred in refusing to hold that if garnishment proceedings lie under the said Act No. 223 of the Session Laws of 1905 of this state, then that such proceedings are for the benefit of all creditors of principal defendant pro-rata.

V.

The Court erred in refusing to hold as requested by the defendant that the act under which this suit is brought is unconstitutional be-

cause it makes the purchaser who does not conform to the provision of the Act, liable to the creditors of the seller without regard to the honesty or good faith of such sale.

17 VI.

The Court erred in refusing to hold that said Act is unconstitutional because it attempts to make a purchaser who conforms to the provisions of the act not accountable to the creditors of the seller no matter how dishonest or fraudulent the transaction may have been and although the sale may have been made with the intent or design to cheat and defraud the creditors.

VII.

The Court erred in refusing to hold that said Act No. 223 of the Session Laws of this State is in violation of Section 32 of Article Six of the constitution of this state which provides that no person shall be deprived of life, liberty or property without due process of law.

VIII.

The Court erred in refusing to hold that said act is void because it violates section one of the 14th amendment to the Federal Constitution, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

Defendant therefore prays that the judgment in this cause for the errors aforesaid may be overruled and held at naught.

G. M. VALENTINE,
Attorney for Garnishee Defendant,
Kidd, Dater & Price Company.

The above entitled cause was removed by writ of error from the Berrien Circuit Court to the Supreme Court of the state of Michigan, where the following proceedings were had:

18 At a Session of the Supreme Court of the State *of the State* of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fourteenth day of October in the year of our Lord one Thousand nine hundred and seven.

Present: The Honorable Aaron V. McAlvay, Chief Justice; William L. Carpenter, Russell C. Ostrander, Frank A. Hooker, Joseph B. Moore, Associate Justices.

No. 22,349.

MUSSELMAN GROCER COMPANY
vs.
KIDD, DATER & PRICE COMPANY.

This cause coming on to be heard is duly submitted upon briefs.

19 Supreme Court of the State of Michigan.

Opinion.

MUSSELMAN GROCER COMPANY, Plaintiff,
vs.
KIDD, DATER & PRICE COMPANY, Defendant and Appellant.

MOORE, *J.:*

This case calls for a construction of the so-called "sales in bulk act," Act No. 223, of the Public Acts of 1905.

The act is assailed for eight different reasons, but all of them revolve about the following propositions which we quote from the brief:

"First. That if Act No. 223 of the Sessions Laws of 1905 of this state is valid that garnishment proceedings do not lie for its enforcement.

"Second. That the said act violates Section 32 of Article VI. of the Constitution of this state, which provides that no person shall be deprived of life, liberty or property without due process of law.

"Third. That the act is in violation of Section I. of the 14th amendment to the Federal Constitution, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

As to the last two of these propositions, though argued at length by counsel, we think it unnecessary to discuss them further than to say we are quite content with what was said in Spurr vs. Travis, 145 Mich., 721.

We then come to the question will garnishment proceedings lie for the enforcement of the law? Counsel say the answer should be in the negative because of the provisions of Sec. 3, which reads:

"Any purchaser, transferee or assignee, who shall not conform to the provisions of this act, shall, upon application of any of the creditors of the seller, transferer or assignor, become a receiver and be held accountable to such creditors for all the goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale, transfer or assignment; Provided, however, That any purchaser, transferee or assignee, who shall conform to the provisions of this act shall not in any way be held accountable to any creditors of the seller, transferor or assignor, or to the seller, transferor or assignor for any of the goods, wares, merchandise or fixtures that have come into the hands of said purchaser, transferee or assignee by virtue of such sale, transfer or assignment."

It is urged that a receiver must be appointed who holds the property for the benefit of all the creditors

It is insisted that in Spurr vs. Travis, supra, the court did not pass

upon the question because counsel admitted that garnishment would lie if the act was constitutional.

Sec. 1 of the act provides:

"The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller, transferor or assignor, shall be void as against the creditors of the seller, transferor or assignor," unless the purchaser shall comply with the provisions of that act, contained in the latter part of the same section.

Sec. 10601 C. L. provides as follows:

"From the time of the service of such writ, the garnishee shall be liable to the plaintiff to the amount of property, money, goods, chattels, and effects under his control, belonging to the principal defendant, or any debts due or to become due from such garnishee to the principal defendant, or of any judgment or decree in favor of the latter against the former and for all property, personal and real, money, goods, evidences of debt, or effects of the principal defendant which such garnishee defendant holds by conveyance, transfer or title that is void as to creditors of the principal defendant, and for the value of all property, personal and real, money, goods, chattels, evidences of debt or effects of the principal defendant, which such garnishee defendant received or held by a conveyance, transfer or title that was void as to creditors of the principal defendant, and such garnishee defendant shall also be liable on any contingent right or claim against him in favor of the principal defendant."

Sec. 10632 C. L. reads:

"If any person garnished shall have in his possession any of the property aforesaid of the principal defendant, which he holds by a conveyance or title that is void as to creditors of the defendant he may be adjudged liable as garnishee on account of such property and for the value thereof, although the principal defendant could not have maintained an action therefor against him."

It will be seen that each of the foregoing sections have reference to sales or transfers of property that are void as to the creditors of the seller, or principal defendant.

The legislature undoubtedly knew of the provisions of the garnishment law in regard to conveyances that are void as against creditors. We think it would destroy the intent of the legislature in passing the act to require the intervention of a court of equity. See Kahn vs. Fishback, 36 Washington, 69; Wilson vs. Edwards, 32 Penn. Inp. Ct., 295; Spurr vs. Travis, supra.

Judgment is affirmed.

JOSEPH B. MOORE.
RUSSELL C. OSTRANDER.
FRANK A. HOOKER.
WILLIAM L. CARPENTER.
AARON V. McALVAY.

(Endorsed:) Filed March 17, 1908. Chas C. Hopkins, Clerk.

21 At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the seventeenth day of March in the year of our Lord one thousand nine hundred and eight.

Present: The Honorable Claudius B. Grant, Chief Justice, Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Joseph B. Moore, William L. Carpenter, Aaron V. McAlvay, Associate Justices.

No. 22,349.

MUSSELMAN GROCER COMPANY, Plaintiff,
vs.
KIDD, DATER & PRICE COMPANY, Garnishee of Frank B. Ford, Defendant and Appellant.

The record and proceedings in this cause having been removed from this court by Writ of Error, issued to the Circuit Court for the County of Berrien, and the same, and the matters in Error assigned, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court there is no Error, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Berrien be and the same is hereby in all things affirmed, and that the plaintiff do recover of the defendant, its costs, to be taxed, and that it have execution therefor.

22 STATE OF MICHIGAN:

In the Supreme Court.

MUSSELMAN GROCER COMPANY, Plaintiff and Appellee,
vs.
KIDD, DATER & PRICE COMPANY, Garnishee of Frank B. Ford, Defendant and Appellant.

The Petition of Kidd, Dater & Price Company, the Above Named Defendant, by G. M. Valentine, its Attorney.

To the Hon. Claudius B. Grant, Chief Justice of Supreme Court of the State of Michigan:

Your petitioner, Kidd, Dater & Price Company, a corporation by G. M. Valentine, its attorney, represents that it is the defendant in the above entitled cause. That this action was originally commenced in the Circuit Court for the County of Berrien and State of Michigan by the above named plaintiff against this defendant. That the plaintiff recovered judgment in said Circuit Court. That thereupon the cause was removed to this Court by writ of error. That on March 17th, A. D. 1908, an opinion was filed by this Court to the effect that the judgment of the said Circuit Court should be affirmed and

that on said day final judgment was entered in this court against this defendant.

Your petitioner further says that in the said Circuit Court and in this Court there was drawn in question the validity of a statute of the State of Michigan on the ground that the said statute was and is repugnant to the Constitution of the United States, and the decision and judgment of this Court was in favor of the validity of
23 such statute, the said statute being Act No. 223 of the Public Acts of the State of Michigan for the year 1905, entitled "An Act to regulate the sales, transfers, and assignments of stock of goods, merchandise and fixtures in bulk."

Your petitioner further shows that a decision concerning the validity of said statute was necessary in the determination of the cause. That the validity of the said statute was actually decided by this Court and that the judgment and decision rendered by this Court could not have been rendered and given without deciding the question whether the said statute is repugnant to the Constitution of the United States. That one of the questions which was actually decided as aforesaid was whether the said act 223 violates Section One of the 14th amendment to the Federal Constitution, which provides that no State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Your petitioner conceives itself aggrieved by the final decision and judgment of this Court in this cause and prays that an order may be entered permitting a writ of error to issue to this Court to review said final judgment in the Supreme Court of the United States.

And your Petitioner will ever pray.

Dated April 3rd, A. D. 1908.

G. M. VALENTINE,
Attorney for Petitioner.

24 [Endorsed:] No. 22349. State of Michigan. The Supreme Court for the State of Michigan. Musselman Grocer Company vs. Kidd, Dater & Price Co. Petition for Writ of Error. Filed April 11, 1908. Chas. C. Hopkins, Clerk. G. M. Valentine, Attorney for Petitioner, Business Address Benton Harbor, Michigan. Let the writ issue Apr. 11, 1908. C. B. Grant, Chief Justice.

25 UNITED STATES OF AMERICA, *ss:*

To Musselman Grocer Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of The State of Michigan, wherein Kidd, Dater & Price Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judg-

ment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Claudius B. Grant, Chief Justice of the Supreme Court of the State of Michigan, this eleventh day of April, in the year of our Lord one thousand nine hundred and eight.

CLAUDIUS B. GRANT,
Chief Justice of the Supreme Court
of the State of Michigan.

On this 15th day of April, in the year of our Lord one thousand nine hundred and eight, personally appeared G. M. Valentine before me, the subscriber, a Notary Public in and for Berrien County, Michigan, and makes oath that he delivered a true copy of the within citation to Smedley & Corwin, Attorneys for Defendant in Error by mailing the same addressed "Smedley & Corwin, Houseman Bldg., Grand Rapids, Michigan," that being the address of the said attorneys for the Defendant in Error; that postage on the same was fully prepaid.

G. M. VALENTINE.

Sworn to and subscribed the 15th day of April, A. D. 1908.

[Seal Humphrey S. Gray, Notary Public, Berrien County, Michigan.]

HUMPHREY S. GRAY,
Notary Public, Berrien County, Michigan.

My commission will expire Jan. 9, 1909.

[Endorsed:] Filed April 18, 1908. Chas C. Hopkins, Clerk.

26 *Bond.*

Know all men by these presents, That we, Kidd, Dater & Price Company, a corporation, as principal and George R. Dater and John R. Price, as sureties, are held and firmly bound unto Musselman Grocer Company, a corporation, in the full and just sum of Two hundred dollars, to be paid to the said Musselman Grocer Company, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this fifteenth day of April, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a session of the Supreme Court of the State of Michigan, in a suit depending in said Court between Musselman Grocer Company, plaintiff and Kidd, Dater & Price Company, defendant, a judgment was rendered against the said Kidd, Dater & Price Company, defendant; and the said Kidd, Dater & Price Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Musselman Grocer Company,

citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof; Now, the condition of the above obligation is such, that if the said Kidd, Dater & Price Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, and shall pay the said judgment if the same shall be affirmed, then the above obligation to be void; else to remain in full force and virtue.

KIDD, DATER & PRICE CO., [SEAL.]
By GEORGE R. DATER, *Treas.*
JOHN R. PRICE, *Sec'y.* [SEAL.]
JOHN R. PRICE. [SEAL.]
GEORGE R. DATER. [SEAL.]

Sealed and delivered in presence of
MAY E. KELLIN.
G. M. VALENTINE.

Approved by
CLAUDIUS B. GRANT,
Chief Justice Supreme Court of the State of Michigan.

(Endorsed:) Filed April 18, 1908. Chas. C. Hopkins, Clerk.

27 STATE OF MICHIGAN:

In the Supreme Court.

MUSSELMAN GROCER COMPANY, Plaintiff and Appellee,
vs.
KIDD, DATER & PRICE COMPANY, Garnishee Defendant of Frank B. Ford, Defendant and Appellant.

Assignments of Error.

And now comes the said defendant by E. L. Hamilton, G. M. Valentine and George W. Bridgman, its attorneys herein and files the following Assignments of Error upon which it relies and says that in the records and proceedings in the above entitled cause in the Supreme Court of the State of Michigan, there is manifest error in this:

I.

The Court erred in its opinion filed March 17th, A. D. 1908, affirming the judgment of the Circuit Court for the County of Berrien, State of Michigan, holding and deciding that Act Number Two Hundred Twenty Three of the Session Laws for the year 1905 of the State of Michigan, is a valid enactment and that the same is not in conflict with Section One of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws.

28 II.

The Court erred in holding and deciding that the effect of the enforcement in this cause of Act Number Two Hundred Twenty Three of the Session Laws of the State of Michigan for the year 1905 was not to deprive the defendant, Kidd, Dater & Price Company, of its property without due process of law within the meaning of the Federal Constitution.

III.

The Court erred in holding and deciding that the action and judgment in favor of the Plaintiff, Musselman Grocer Company and against the defendant, Kidd, Dater & Price Company, did not deprive the said defendant of its property without due process of law within the meaning of the Federal Constitution.

IV.

The said Supreme Court of the State of Michigan erred in holding that said Act Number Two Hundred Twenty Three of the Session laws of the year 1905 of the State of Michigan does not violate Section Ten of Act I. of the Federal Constitution, which provides that no State shall pass any law impairing the obligation of contracts.

V.

The Court erred in holding that said Act Number Two Hundred Twenty Three of the Session Laws of the year 1905 of the State of Michigan does not create an unreasonable restraint upon trade.

VI.

The Court erred in holding that said Act Number Two Hundred Twenty Three of the Session Laws of the State of Michigan of the year 1905 is a valid exercise of the police power of the State of Michigan.

VII.

The Court erred in refusing to hold and to decide that the said Act Number Two Hundred Twenty Three of the Session laws
29 of the year 1905 of the State of Michigan is void because by its terms, it makes ordinary business transactions which by the law are presumably valid, conclusively dishonest, fraudulent and void.

VIII.

The Court erred in holding that said Act Number Two Hundred Twenty Three does not offend any provision of the Federal Constitution.

IX.

The Court erred in rendering the final judgment for the plaintiff, Musselman Grocer Company and against the defendant, Kidd, Dater & Price Company.

Dated April 16th, A. D. 1908.

E. L. HAMILTON,
G. M. VALENTINE,
G. W. BRIDGMAN,
Attorneys for Plaintiff in Error.

30 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Musselman Grocer Company, a corporation, Plaintiff, and Kidd, Dater & Price Company, a corporation, Defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction
31 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Kidd, Dater & Price Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eleventh day of April, in the year of our Lord one thousand nine hundred and eight.

[Seal of the U. S. Circuit Court, Southern Division, Western District of Mich.]

CHARLES L. FITCH,
Clerk of the Circuit Court of the United States for the Western District of Michigan.

Allowed by
CLAUDIUS B. GRANT,
Chief Justice of the Supreme Court of the State of Michigan.

[Endorsed:] Filed April 13, 1908. Chas C. Hopkins, Clerk.

To the Supreme Court of the United States:

The execution of the within Writ of Error appears by transcript of record hereto annexed.

Dated April 27, 1908.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

32 Supreme Court of the State of Michigan.

KIDD, DATER & PRICE COMPANY, Plaintiff in Error,
vs.
MUSSELMAN GROCER COMPANY, Defendant in Error.

STATE OF MICHIGAN,
In the Supreme Court, ss:

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the judges of said Court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof; that attached thereto are the petition for the writ of error, the writ of error with allowance endorsed thereon, the citation with proof of service of a copy thereof upon the adverse party, a copy of the bond to the adverse party, duly approved, together with the assignments of error in the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court at the City of Lansing, this twenty-seventh day of April in the year of our Lord one thousand nine hundred and eight.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No. 21,154. Michigan supreme court. Term No. 149. Kidd, Dater & Price Company, plaintiff in error, vs. Musselman Grocer Company. Filed April 30th, 1908. File No. 21,154.

BRIEF
FOR THE PLAINTIFF IN ERROR

Supreme Court of the United States

OCTOBER TERM, 1909

No. 149

KIDD, DATER AND PRICE COMPANY, *Plaintiff in Error,*

vs.

MUSSELMAN GROCER COMPANY, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

(21,154)

E. L. HAMILTON,
G. M. VALENTINE,
G. W. BRIDGMAN,
E. B. VALENTINE,
Attorneys for Plaintiff in Error.

DEVORE & ALGER, PRINTERS, SUPERIOR BUILDING, CHICAGO.

BRIEF
FOR THE PLAINTIFF IN ERROR

Supreme Court of the United States

OCTOBER TERM, 1909

No. 149

KIDD, DATER AND PRICE COMPANY, *Plaintiff in Error,*

vs.

MUSSELMAN GROCER COMPANY, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

(21,154)

Statement of the Case

Plaintiff in error is engaged in the wholesale grocery trade at Benton Harbor, Michigan, and defendant in error is in the same business at Grand Rapids, Michigan. The defendant in error, Musselman Grocer Company, brought suit in the Circuit Court for Berrien County, Michigan, against Frank B. Ford, and at the same time commenced suit against Kidd, Dater & Price Company, plaintiff in error, as garnishee of Ford, under and by virtue of Act Number 223 of the Session Laws of the State of Michigan for the year 1905, commonly known as the "Bulk Sales Law." The act is hereinafter quoted in full.

The plaintiff having recovered judgment against Ford, the case against the garnishee, Kidd, Dater & Price Com-

pany, was tried in said court, where the following facts appeared as shown by the record:

Ford, the principal defendant, owned and operated a department store in the Village of Berrien Springs, which consisted of a grocery department; hardware department; implement department, containing agricultural implements, buggies, harnesses, etc.; also a meat market and furniture department. Ford had sold out the implement department before the transaction here involved arose, but he still owned all the other departments and was operating them.

On or about May 23, 1906, plaintiff in error bought the grocery department at ninety per cent. of an inventory to be taken at cost, which was all the property was worth, and more than it would ordinarily sell for. The purchase price, after deducting ten per cent. from the cost, amounted to the sum of $2,126.84. At the time the purchase was agreed upon, Kidd, Dater & Price Company paid Ford $100.00 on the purchase price, and on May 31, 1906, when the inventory had been completed, paid him the balance of the purchase price, less $415.45, which was the amount that Ford owed to Kidd, Dater & Price Company for goods that he had purchased of them.

After the sale to Kidd, Dater & Price Company, Ford had still remaining the meat market, worth from $800 to $1,000; the hardware department, worth between $5,000 and $6,000; and the furniture department, the value of which does not clearly appear from the record. Ford also owned the building in which the stores were situated, which was a brick structure, two stories in height, and about one hundred feet deep. The value of the real estate was about $6,000 or $7,000.

Before and at the time final payment was made for the stock of groceries, Ford stated to Kidd, Dater & Price Company that HE HAD PLENTY OF MONEY TO PAY HIS DEBTS, AND THAT HE WOULD PAY THEM. THERE WAS NO PURPOSE on the part of the garnishee (plaintiff in error), by its purchase, TO HINDER OR DELAY THE CREDITORS OF FORD in the collection of their claims or demands against him; Kidd, Dater & Price Company had no knowledge of any such intention on Ford's part; and there is NOTHING IN THE RECORD TO INDICATE THAT FORD HIMSELF HAD ANY FRAUDULENT INTENTION in making the sale.

The collection of the amount which Ford owed to Kidd, Dater & Price Company, had nothing to do with the purchase and sale. Kidd, Dater & Price Company bought the

groceries merely as an investment, and for the purpose of setting up in business two young men, who, it was understood, would become customers of their grocery house. Afterward, Ford sold his stock of hardware to the Wilson Hardware Company for the sum of $4,100. In that sale, the "Bulk Sales Act" was followed. Still later the meat market was sold to Lybrook & Penwell, but the record does not show the amount paid for it, nor whether the "Bulk Sales Act" was complied with.

The amount of the judgment of the Musselman Grocer Company against Ford was $467.07, including costs. The record shows that previously to the trial of the case at bar, the Musselman Grocer Company had also sued the Wilson Hardware Company, as garnishee of Ford, and had recovered judgment against that company for the sum of $161.93, which was the amount that had not been paid to Ford at the time of the service of the writ of garnishment in that case.

It was admitted that the sum of $151.93 had been paid into court by the Wilson Hardware Company, which should be applied on the judgment against Ford, leaving $315.14 unpaid. It was admitted by counsel for the respective parties that the amount unpaid on the judgment against Ford, with interest, was $320.39.

The record shows that Dix & Wilkinson had obtained judgment against Ford in the Circuit Court for Berrien County, Michigan, on November 26, 1906, for the sum of $1027.61; that on the same date, a writ of garnishment had been issued at the suit of Dix & Wilkinson against Kidd, Dater & Price Company, as garnishee of Ford, in the usual form of writs of garnishment in proceedings after judgment; that on December 7, 1906, the garnishee defendant had filed disclosure denying all liability. The record does not show that the judgment in favor of Dix & Wilkinson had in any way been satisfied.

It also appeared that on or about February 1, 1907, a petition had been filed in the United States Court for the Western District of Michigan to have the said Frank B. Ford adjudged a bankrupt, and that such proceedings were still pending. A copy of that petition will be found on page eight (8) of this record.

At the close of the evidence, the defendant, Kidd, Dater & Price Company, by its attorney, requested the Court to direct the jury to render a verdict for the defendant on the following grounds:

First, That if Act No. 223 of the Session Laws of 1905

of this state is valid, garnishment proceedings do not lie for its enforcement.

Second, That the said act violates Section 32 of Article VI of the Constitution of this state, which provides that no person shall be deprived of life, liberty or property, without due process of law.

Third, That the act is in violation of Section One of the Fourteenth Amendment to the Federal Constitution, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourth, That the said act is void, because it creates unreasonable restraint upon trade.

Fifth, That the said act attempts to make ordinary business transactions, which are presumably honest, conclusively dishonest, fraudulent, and void.

Sixth, That the act is void, because it is not a valid exercise of the police power of the state.

Seventh, That the act under which this garnishment suit is brought, is unconstitutional and void, because it makes the purchaser who does not conform to the provisions of the act accountable to the creditors of the seller WITHOUT REGARD TO THE HONESTY OR GOOD FAITH OF THE TRANSACTION.

Eighth, That the act is unconstitutional, because it attempts to make the purchaser who conforms to the provisions of the act not accountable to creditors, no matter how dishonest or fraudulent the transaction may have been, and although the sale may have been made with the intent and design to cheat and defraud the creditors of the seller.

See Transcript of Record, pages 6 and 7.

Counsel for defendant also asked that in case the foregoing motion should be overruled, the Court instruct the jury as follows:

> "If the jury find from the evidence that after the sale in question to Kidd, Dater & Price Company, the seller, Frank B. Ford, was still the owner of goods to the value of Five Thousand Dollars ($5,000) or more, then the garnishee, Kidd, Dater & Price Company, cannot be held to the plaintiff, the Musselman Grocer Company, and if you so find, your verdict should be for the defendant."

Transcript of Record, page 7.

The Court overruled the motion, denied the request for

instructions to the jury, and directed the jury to render a verdict for the plaintiff, and against the garnishee defendant, for the sum of $320.39; and thereupon judgment was rendered for the plaintiff, and against the garnishee defendant, for the sum aforesaid, together with the costs to be taxed.

The defendant appealed the case to the Supreme Court of the State of Michigan by bill of exceptions and writ of error. The assignments of error in that court appear on pages 11 and 12 of this record.

The Supreme Court of Michigan affirmed the judgment of the trial court and held that the act under which the suit was brought, being Act No. 223 of the Session Laws of the State of Michigan for the year 1905, does not offend the Constitution of the United States, as alleged in the errors assigned. The opinion of that court is found on pages 13 and 14 of this record.

The act in question reads as follows:

> **"AN ACT to regulate the sales, transfers and assignments of stocks of goods, merchandise and fixtures, in bulk.**
>
> **"The People of the State of Michigan enact:**
>
> **"Section 1. The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller, transferor, or assignor, shall be VOID as against the creditors of the seller, transferor, assignor, unless the seller, transferor, assignor and purchaser, transferee and assignee, shall, at least five days before the sale, make a full detailed inventory, showing the quantity and, so far as possible with exercise of reasonable diligence, the cost price to the seller, transferor and assignor of each article to be included in the sale; and unless the purchaser, transferee and assignee demands and receives from the seller, transferor and assignor a written list of names and addresses of the creditors of the seller, transferor and assignor, with the amount of indebtedness due or owing to each, and certified by the seller, transferor and assignor, under oath, to be a full, accurate and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee and assignee shall, at least five days before**

taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof.

"Sec. 2. Sellers, transferors and assignors, purchasers, transferees and assignees, under this act shall include corporations, associations, copartnerships and individuals. But nothing contained in this act shall apply to sales by executors, administrators, receivers, trustees in bankruptcy, or by any public officer under judicial process.

"Sec. 3. Any purchaser, transferee or assignee, who shall not conform to the provisions of this act, shall, upon application of any of the creditors of the seller, transferor, or assignor, become a receiver and be held accountable to such creditors for all the goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale, transfer or assignment: Provided, however, That any purchaser, transferee or assignee, who shall conform to the provisions of this act SHALL NOT IN ANY WAY BE HELD ACCOUNTABLE to any creditor of the seller, transferor or assignor, or to the seller, transferor or assignor for any of the goods, wares, merchandise or fixtures that have come into the possession of said purchaser, transferee or assignee by virtue of such sale, transfer or assignment.

"Approved June 16, 1905."

Specification of the Errors Relied Upon

The plaintiff in error relies upon all the assignments of error in this Court, as shown on pages 18 and 19 of the Transcript of Record.

Assignments of Error Nos. I, II, III, and VIII are directed to the holding by the Supreme Court of Michigan, that the act quoted is not in conflict with the Fourteenth Amendment to the Federal Constitution, which provides that

no state shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws.

We rely upon the Assignments of Error Nos. IV and VIII, which raise the point that the act in question violates Section Ten of Article One of the Federal Constitution, which provides that no state shall pass any law impairing the obligation of contracts.

We rely upon Assignments of Error Nos. V, VI, and VII, which are based upon the ground that the act in question is not a valid exercise of the police power of the state; also that the act creates unreasonable restraint upon trade; also that it attempts to make ordinary business transactions, which by the law are presumably valid, conclusively dishonest, fraudulent and void, and that, therefore, the act is in violation of the Constitution of the United States.

We also rely upon Assignments Nos. VIII and IX, which raise the point that the decision of the Michigan Supreme Court is in violation of the rights of the plaintiff in error under the Federal Constitution.

Brief of the Argument

THE DECISION OF THE CASE TURNS UPON THE QUESTION, WHETHER THE ACT OF THE LEGISLATURE OF MICHIGAN WHICH WE HAVE QUOTED, OFFENDS THE FEDERAL CONSTITUTION IN THE PARTICULARS SET FORTH IN THE ASSIGNMENTS OF ERROR. If it does, the judgment of the Supreme Court of Michigan must be reversed, for it will be conceded that no other act of the Michigan Legislature authorizes garnishment proceedings under the circumstances shown by the record in this case.

We think it well to enumerate at the outset the requirements of the statute in the case of sales other than in the ordinary course of trade. They are as follows:

(a)—The seller and the purchaser must, at least five days before the sale, make a full detailed inventory, showing the quantity, and, so far as possible, with the exercise of due diligence, showing the cost price to the seller of each article to be included in the sale.

(b)—The purchaser must demand and receive from the seller a written list of the names and addresses of the creditors of the seller, with the amount of indebtedness

due or owing to each, certified by the seller, under oath, to be a full, accurate and complete list of his creditors, and of his indebtedness.

(c)—The purchaser must, at least five days before taking possession of the goods or paying for them, notify every creditor whose name is in the list, or of whom he has knowledge, of the proposed sale, and the price, terms and conditions of such sale.

(d)—The notice must be served on the creditors either personally or by registered mail, according to the addresses stated in the list.

(e)—By Section Three of the act a purchaser who does not conform to the provisions of the act, shall, upon application of any of the creditors be held as a receiver (The Supreme Court of Michigan said in this case, that he may be held as a garnishee), and be held accountable to such creditors for all goods which have come to his possession by virtue of the sale.

(f)—Every person who shall conform to this act shall not be held accountable to any creditor of the seller for any of the goods that have come into the possession of the purchaser by virtue of the sale.

The Effect of the Act Upon the Seller

The enforcement of the act deprives a MERCHANT of his property without due process of law, by making it extremely difficult, if not impossible, whenever he may be in debt, as he usually is, for him to make a sale of his stock of merchandise, or any part of it, otherwise than in the ordinary course of trade, even though he may desire to make the sale for honest purposes.

SALES INCLUDED

Any sale in bulk of any part of a stock of merchandise, "otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller," brings the parties, both purchaser and seller, within the terms of the statute. An inventory must be made, notice must be given to the creditors, and the sale must be "held up" five days, if such sale is not according to the usual course of trade of that particular merchant, or else the purchaser may be held as garnishee (as in this case).

If a merchant whose usual and regular course of trade has been the sale of goods at retail, should sell even a part of

his goods at wholesale, and with no intention of going out of business, the sale would be void as to creditors under the terms of the statute. If a grocer who has usually sold sugar by the pound should then sell a barrel of sugar at one sale to one customer, he would violate the statute, and so would the purchaser, unless an inventory should be taken and notice given to the creditors.

In like manner, if a dealer who had ordinarily sold at wholesale should then sell at retail, or should attempt to change the course of his business to both wholesale and retail, he would offend this statute. If Kidd, Dater & Price Company or Musselman Grocer Company should change from an exclusive wholesale business to a retail business or to a wholesale and retail business, their sales would be void as to their creditors, unless they should shut up their places of business long enough to comply with all the vexatious provisions of the act.

If the Michigan Bulk Sales Act has to be followed, no one will buy goods at retail of a wholesale merchant, and no one will buy goods at wholesale of a retail merchant; no wholesale merchant will sell at retail, and no retail merchant will sell at wholesale. According to this alleged law, whatever course of trade a dealer adopts, that course he must follow forever after, if he owes a dollar, or anyone claims he owes a dollar.

We do not know what the legislature meant by the word "fixtures" in the act, whether it really meant "fixtures" (personal chattels affixed to the real estate), or whether store furniture, tools, and appliances were intended. In either case must be meant a class of property not kept for sale at all, and about which there can therefore be no ordinary course of trade, and yet, a merchant cannot, according to the act, make a valid sale of such property other than in the ordinary course of trade, without making an inventory of such articles, giving the cost price to the seller, notifying creditors, etc., etc., etc., etc.

THE INVENTORY

A full detailed inventory must be made, showing the quantity, and, so far as possible with the exercise of reasonable diligence, the COST PRICE TO THE SELLER, OF EACH ARTICLE TO BE INCLUDED IN THE SALE. Each article, no matter how insignificant in value, must be itemized, and the cost stated. The seller must disclose to the intending purchaser and through him to the

world, the cost price of each and every article, and this before he knows or can know that the sale will be completed.

The time required in the case of the attempted sale of a large department store, such as may be found in cities like Detroit and Grand Rapids, would be such as to place an embargo upon the sale, because weeks would be consumed in the work, and a heavy expense incurred.

Would not an act of the legislature requiring every merchant before he sold an article, to state to the prospective purchaser under oath ITS EXACT PRICE, be so oppressive as to be invalid? A retail merchant under this act could perhaps sell one barrel of flour—but if he chanced to have a surplus of stock—and wished to sell ten barrels, he must declare to the buyer, before he sells, (and strictly five days before he completes the sale), THE EXACT COST PRICE OF SUCH FLOUR in addition to all other notices and conditions required by the act.

Such a requirement imposes a most UNREASONABLE RESTRAINT UPON TRADE. It compels the disclosure of private affairs not required of others more fortunate.

THE LIST OF CREDITORS

The act requires that the purchaser shall demand and receive from the seller a written list of the creditors, showing for each creditor his name, his address, and the amount of indebtedness owing to him, together with the certificate of the seller (under oath) that the list is full, accurate, and complete.

Suppose that the list is not full, accurate, and complete, the certificate of the seller under oath to the contrary notwithstanding, but that the purchaser has no reason to doubt the fullness, accuracy and completeness of the list. May the purchaser rely upon the certificate of the seller under oath, or must he ascertain for himself the accuracy and completeness of the list and rely upon it at his peril?

The act does not merely require that the purchaser shall DEMAND such a list; it requires also that he shall actually RECEIVE the list. The act does not merely require that the purchaser shall receive a list PURPORTING to be a list of the creditors, their addresses, and the amount of indebtedness owing to each, and certified by the seller under oath to be such; it requires that the purchaser shall actually RECEIVE a list of the creditors, etc. Not of creditors merely, but of THE creditors. Not showing indebtedness

merely, but "the amount of indebtedness due or owing to each." Not merely purporting to show "the amount of indebtness due or owing to each;" but actually showing such indebtness.

There is nothing in the act authorizing the purchaser to rely upon the seller's certificate under oath. The word "and" before the word "certified" is significant. The act, we think, requires that the list shall be a list of the creditors, AND, that it shall be certified to by the seller under oath.

There is nothing said in this part of the act about reasonable diligence. It does not make reasonable diligence on the part of the seller, or of the purchaser, or of both, in the preparation of the list, sufficient for this requirement. The act requires nothing less than a written list of the names and addresses of the creditors with the amount of indebtedness due or owing to each.

Suppose the list is complete and accurate as to the creditors and their addresses, but inaccurate as to the indebtedness; may the purchaser rely upon the seller's certificate under oath? Suppose the list is complete and accurate as to the creditors and the indebtedness, but not accurate as to the addresses, perhaps because of recent changes in addresses; or suppose the list is complete and accurate as to the addresses and as to the indebtedness, but there are some clerical errors in the names of the creditors; may the purchaser rely upon the seller's certificate under oath? Suppose there are errors in the list of the names and of the addresses, but not in the indebtedness; or errors in the addresses and the indebtedness, but not in the names; or errors in the names and indebtedness, but not in the addresses, may the purchaser rely upon the seller's certificate under oath? Suppose errors may be found in the names, in the addresses, and also in the indebtedness, may the purchaser rely upon the seller's certificate under oath? OR WILL THE SALE BE VOID?

Can any merchant make an advantageous sale of his stock of goods, if the purchaser has to run such a great risk of having the sale held invalid under the Bulk Sales Act?

THE NOTICE

The act requires notice to be given to ALL creditors, whether their claims are due or not, and that notice must be given five days in advance of the sale, and the notice must be personal or by registered mail.

A DUPLICATE OF THE INVENTORY, complete

down to each paper of pins, MUST BE SERVED ON EACH CREDITOR, for the act says that the creditors must have notice of the price, terms, and conditions of the sale.

The notice, if by mail, must be such that the creditor will receive it in due course of mail, five days before the sale, WHETHER THE CREDITOR IS A DOMESTIC OR A FOREIGN ONE. He may live in Alaska or Timbuctoo, but he must have the notice five days before the completion of the sale. The creditor may live where he cannot be reached by registered mail, but still he must have the notice, either by registered mail or PERSONALLY.

All creditors of the seller must be notified, WHETHER THE CREDIT WAS FOR ARTICLES WHICH EVER FORMED A PART OF HIS STOCK OR NOT. If a merchant engaged in the sale of hardware owes his tailor for a suit of clothes, the sale of a stock of hardware is void as to the tailor, unless notice is given him, under this statute.

IT MATTERS NOT THAT THE DEBT MAY BE AMPLY SECURED. If a merchant owns a farm worth $20,000 upon which there is a mortgage of $1,000, the mortgagee must be notified, or the sale will be void as to him, and he may hold the purchaser of the stock as a garnishee, ALTHOUGH THE MORTGAGE MAY NOT BE DUE. The notice must be given although the seller's assets may exceed his liabilities one hundred to one, and although the sale may involve only ONE HUNDREDTH PART OF THE PROPERTY OWNED BY THE SELLER.

THE ACT REQUIRES STRICT OBSERVANCE OF EACH OF THESE HARASSING DETAILS OR PAYMENT OF EVERY CREDITOR.

A FAVORITE ARGUMENT in support of legislation of this class and one used by the Supreme Court of Michigan in sustaining the statute here in question, *Spurr vs. Travis,* 145 Mich. 721, is that in the case of an owner who owes no debts, no delay is required, and that an owner who is in debt, may qualify himself at once by paying his debts, or if not, the sale is postponed until notice is given as the statute provides.

BUT HOW SHALL THE PURCHASER KNOW THAT THERE ARE NO CREDITORS? The statute does not authorize him to rely on the statement or the affidavit of the seller, that he is not in debt. In every sale, it is

required that the inventory shall be made, if it turns out that there are any creditors.

If the seller attempts to discharge his debts at the time of the sale, HOW SHALL THE PURCHASER KNOW THAT ALL OF HIS DEBTS ARE PAID? The only safety for the purchaser is to insist that the inventory shall be made, the notices given, the expense incurred, and the time consumed, in every case, and this notice must be such as to reach the creditor at least five days before the completion of the sale.

Wright vs. Hart, supra.

"What is the practical effect? A seller who is abundantly able to pay his debts is compelled by law to do so before he can dispose of a part of his possessions. He must pay his debts, whether they are due or not. He must pay them, whether they are in dispute or not. He must pay creditors who have no legal, equitable, or moral claim upon the particular property or its proceeds. And if he depends upon the proceeds of the particular sale to pay his debts, HE MUST PAY THEM AT LEAST FIVE DAYS BEFORE HE GETS THE MONEY. Thus an intending seller is under the necessity of practically obtaining the consent of his creditors before he can make a sale. He must pay a claim that may be in dispute, right or wrong, and he must take what equitably belongs to the creditor for purchase price and pay it to general creditors, or he can be 'held up.' This may not be a literal taking of property without due process of law, but it is an ANNIHILATION OF ITS VALUE AND A DESTRUCTION OF ITS ATTRIBUTES, so that while the owner is permitted to retain his property in name, he is DEPRIVED OF ITS ESSENCE AND SUBSTANCE." Page 408 of 75 N. E.

Wright vs. Hart, 182 N. Y. 330.

It is not dishonest, neither is it evidence of dishonesty, to buy or sell property when one is in debt. Debtors often sell property FOR THE PURPOSE OF PAYING THEIR DEBTS, and the law justifies them in so doing.

If this legislation is valid, then it is competent for the legislature to make every transfer of a debtor's property, real and personal, void. The property rights guaranteed by the Fourteenth Amendment to the Federal Constitution consist, not merely in the title or right to the possession of property;

they include the right to make any lawful use of the property and the right to pledge or mortgage it, to sell or transfer it, and the right to buy it, so long as the sale or transfer is not made for fraudulent purposes.

Kuhn vs. Common Council, 70 Mich. 534.

Nothing less than an opportunity to be heard in court upon the question of the honesty of a purchase and sale can be "due process of law." Where life and liberty, or the title and possession of property are involved, due process of law requires that there be a regular course of judicial proceedings, and that the party to be affected shall have notice and an opportunity to be heard.

Hagar vs. Reclamation District No. 108, 111 U. S. 701, 28 Law. Ed. 569.

The Effect of the Act upon the Purchaser

The enforcement of the act deprives an honest PURCHASER of a stock of goods of his property without due process of law, by compelling him to pay for the goods twice, if the terms and conditions of the act have not been followed, no matter whether it is possible for him to know that they have been followed or not.

The act requires that the seller and purchaser shall make a full detailed inventory showing the quantity, and so far as possible with the exercise of reasonable diligence, the cost price of each article to be included in the sale.

It will often happen that the original invoices or some of them have been lost or destroyed and that the cost price cannot be ascertained precisely, and perhaps not approximately. In such a case, although all the other provisions of this vexatious statute may have been complied with literally, it will still be a question of fact to be determined by a jury, whether the cost price to the seller has been ascertained as nearly as possible with the exercise of reasonable diligence. If the jury in a given case shall answer the question in the negative, then THE PURCHASER MUST PAY TO THE CREDITORS THE VALUE OF THE GOODS which he has once in good faith paid to the former owner.

But how is the purchaser to know anything about the cost price? The reasonable diligence to be exercised in the making of the inventory is that of the seller as well as that of the purchaser, and if the seller fails in the performance of his duty, ALL CONSEQUENCE OF HIS FAILURE OF DUTY

FALLS UPON THE PURCHASER, although the latter may have used the most extreme care and diligence.

And what is the cost price to the seller? Is it the price as shown by the invoice, or may the freight or express charges for the goods be added? In other words, is it the cost at the place of purchase, or delivered at the merchant's place of business? The difference in the case of bulky merchandise will be considerable. Some merchants discount their bills or pay cash, and in such cases the real cost will be much less than in the case of the merchant who cannot or does not obtain the benefit of discount or cash payment.

Is the cost price in the two classes of cases the same, or is it different? THE PURCHASER MUST, BY THE TERMS OF THE ACT, DECIDE THE QUESTION CORRECTLY, or rather in the same manner as a court or jury will afterward decide it, OR BE DEPRIVED OF HIS PROPERTY BY BEING COMPELLED TO PAY THE CLAIMS OF THE CREDITORS UP TO THE VALUE OF THE GOODS PURCHASED.

The sworn list of creditors is to be made by the SELLER and if the statute makes the sale void if the list is incorrect, as it apparently does, then all consequence of the SELLER'S delinquency falls upon the PURCHASER.

In the case of a creditor living a thousand miles away, several days must be added to the five days, within which notice of the sale must be given, and IT IS AT THE PERIL OF THE PURCHASER TO KNOW THAT THE TIME IS SUFFICIENT. BUT LET US SUPPOSE THAT THE NOTICE ACTUALLY REACHES THE CREDITOR. HE CAN DO NOTHING TO PREVENT THE SALE, or to reach the property proposed to be sold—we shall discuss this in another place.

GOOD FAITH NO DEFENCE

A striking feature of the act is that a purchaser who does not conform to the act is held accountable upon the application of any creditor, EVEN THOUGH BOTH HE AND THE SELLER ACTED HONESTLY AND WITH NO INTENT TO CHEAT OR DEFRAUD ANY ONE, WHICH IS THE CASE IN THIS INSTANCE, as the record shows without contradiction. The purchaser who has paid full value for the goods in good faith, and with no information that the seller owes any debts, must pay to the creditors of the seller, the value of the goods, which he has already once paid to the seller himself.

The act does not merely make sales without compliance with the statute presumptively void, but ABSOLUTELY VOID, and proof of honesty and good faith is no defense whatever. Every citizen under our constitution is entitled to the presumption of honesty in his daily transactions, and if his honesty be attacked, his dishonesty and his fraud must be proved before he can be deprived, either of his liberty, his property, or his good name.

Kuhn vs. Common Council, 70 Mich. 534.

The Effect of the Act upon the Creditors

FIRST, WHEN THE ACT IS EVADED.

The statute is not of the slightest use as a protection to creditors, for it may always be evaded.

The owner of the stock of goods may agree with the proposed purchaser on the price of the goods. The intending purchaser may then lend to the owner of the goods a sum equal to that amount. The purchaser may take a chattel mortgage for the amount, due on demand, or due one day after date, and take possession of the goods under the mortgage the next day. In that case, NONE OF THE STEPS REQUIRED BY THE STATUTE NEED BE TAKEN, because such a mortgage is not a sale, transfer, or assignment within the meaning of the act. The Supreme Court of Michigan has distinctly so held.

Hannah & Hogg vs. Richter Brewing Company, 149 Mich. 220, 12 L. R. A. (N. S.) 178.

Since the decision in that case, purchasers of stocks of goods have been effecting their purchases by taking chattel mortgages and foreclosing the same, and in that way entirely defeating the object of the act. Nothing could more effectually demonstrate the entire uselessness of this alleged law.

SECOND, WHEN THE ACT IS VIOLATED.

The only benefit to the creditors is in case the requirements of the statute are not observed, and the benefit is NOT TO THE CREDITORS PRO RATA but only to such as begin their suits in garnishment, and in the order in which suits are brought. The creditor who first brings garnishment gets his money or a judgment against the purchaser as garnishee (as in this case,) irrespective of the claims or demands of all other creditors.

THE CREDITOR WHOSE CLAIM OR DEMAND IS NOT DUE IS PRACTICALLY NOT IN THE RACE AT ALL, for, ordinarily at least, no suit will lie until the demand upon which it is founded becomes due, and by that time, the other creditors will probably have exhausted all the assets in the hands of the purchaser by garnishment or otherwise.

If it shall be argued that the statute provides for the appointment of a receiver who shall hold for the benefit of all creditors, the answer is that the Supreme Court of Michigan, held to the contrary in this case.

THIRD, WHEN THE ACT IS OBSERVED.

A noticeable peculiarity of this statute, and one which distinguishes it from all other legislation which the writer remembers to have read, is that NO BENEFITS FLOW TO CREDITORS OF MERCHANTS FROM ITS OBSERVANCE. THE ACT REQUIRES GREAT TROUBLE AND EXPENSE WITHOUT BEING OF THE SLIGHTEST BENEFIT TO CREDITORS. Those who conform to the act cannot be held at all, EVEN THOUGH BOTH SELLER AND PURCHASER INTENDED BY THE TRANSACTION TO DEFRAUD THE CREDITORS OF THE SELLER.

No other statute, so far as we can learn, contains any provision like the proviso in Section Three of the Michigan act, providing that sales made in accordance with the act shall be incontestable. "Any purchaser, transferee or assignee, who shall conform to the provisions of this act shall not in any way be held accountable to any creditor of the seller, transferor or assignor, or to the seller, transferor or assignor for any of the goods, wares, merchandise or fixtures that have come into the possession of said purchaser, transferee or assignee by virtue of such sale, transfer or assignment."

The enforcement of the act enables a purchaser who has obeyed it, and who is also a creditor of the seller, to deprive other creditors of their property without due process of law.

If the various steps required by the act are being taken, we believe it to be clear that THE CREDITORS CAN DO NOTHING DURING THE FIVE DAYS' PERIOD, and until after the property has been delivered to the seller, for the reason that the parties are proceeding in conformity with the act. The purchaser CANNOT BE HELD AFTER THE EXPIRATION OF THE FIVE DAYS' NOTICE and after the delivery of the goods, because the ACT EXPRESSLY SAYS THAT HE SHALL NOT BE SO HELD.

In a given case, let us suppose that a list of creditors has been furnished, the inventory made, and the notices given. If, during the five days, a creditor begins suit by attachment or other form of action designed to reach the goods, the statute itself will defeat him, because the buyer and seller are proceeding in the manner in which the statute says they must, and in the only way they are permitted to proceed. If he waits until the sale shall have been completed, there remains no remedy by attachment or otherwise, against the property, either at law or in equity, and none against the purchaser, because the statute says that a purchaser who conforms to the provisions of the act, shall not in any way be held accountable. If the purchaser and seller adopt the form provided for by the act, they are immune, no matter what their intention may have been.

If the act was intended to accomplish the *pro rata* distribution among creditors of the assets of debtors, IT IS A CONSUMMATE FAILURE. In practice, the act is a machine by which one creditor may, if he operates it according to directions, get all the assets and leave the other creditors without remedy against the goods. The machine is being so operated now, as the following actual occurrence stated with substantial accuracy will show:

A small dealer owed $1,000, of which $600 was to one creditor. The merchant sold out to the largest creditor. In this sale, all the provisions of the act were followed. The stock inventoried $590. The notice to the other creditors informed them that at the expiration of five days the purchaser would credit the seller with the sum of $590, which was done.

The creditors still have their right of action against the debtor, but THERE ARE NO LONGER ANY GOODS SUBJECT TO LEVY ON EXECUTION. The largest creditor has his claim paid practically in full and is secure against any attack from the other creditors by the plain language of the act. A proceeding in involuntary bankruptcy

will not lie, because the total remaining indebtedness of the merchant is less than $500.

Can such a statute be upheld under the police power of the states, or any other power?

The enforcement of the act deprives a CREDITOR of his property without due process of law, by destroying all remedy against the debtor's goods, probably at once, and certainly after five days from the time of receiving notice of the proposed sale.

If creditors have any remedy against the goods of the debtor who is selling out and observing the statute, (which we do not admit) they must certainly bring their suit for that purpose within five days after receiving notice of the proposed sale, and not afterward.

Before the enactment of this statute, a creditor might in a proper case maintain an action of replevin or trover within six years from the time the cause of action accrued.

Compiled Laws of the State of Michigan, 1897, Sec. 9728.

A creditor had also the right to bring an action upon contract by attachment within the same time and seize the property, real and personal, thereunder. The writ might issue upon various grounds, such as that the debtor had assigned, disposed of, or concealed any of his property with the intent to defraud his creditors, or that he was about to do so. He might bring attachment on the ground that the debtor had fraudulently contracted the debt or incurred the obligation respecting which the suit was brought.

Compiled Laws of the State of Michigan, 1897, Chapter 292.

By the most liberal interpretation possible, all these remedies against the property of the debtor are destroyed by the act in question, unless brought within five days after receiving the notice of the transfer. At the very best, the statute is a FIVE-DAY STATUTE OF LIMITATIONS OF ACTIONS.

It needs no citation of authorities to show that SUCH A STATUTE IS UNREASONABLE AND VIOLATES THE PROPERTY RIGHTS OF CREDITORS, AND THAT IT IS THEREFORE UNCONSTITUTIONAL AND VOID. We understand that "the power of a state or of Congress to establish or alter statutes of limitation is subject always to the condition that a reasonable time for bringing suit shall be allowed, not only as to causes of action sub-

sequently arising, but as to those which have already accrued. To prescribe an unreasonably short period of limitation would be as much an impairment of the obligation of contracts, or a taking of property without due process of law, as if plaintiff's rights were directly destroyed, although the statute might be under the guise of one affecting the remedy merely."

19 *Am. & Eng. Enc. of Law,* 2d Ed., 169, 170.

"It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought; * * * * * * * * * and a statute that fails to do this cannot possibly be sustained as a law of limitations, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law."

Price vs. Hopkin, 13 Mich. 318, 324, and cases cited.

Similar Legislation

Legislation similar to the act here involved, and for the same general purpose, has been enacted in many states. Such acts have been held violative of both the State and United States Constitutions, in the states of New York, Ohio, Indiana, Illinois, Utah, and Virginia, on the ground that the effect of such statutes is to cause the deprivation of property without due process of law, and that the same does not afford to persons interested, the equal protection of the laws.

Wright vs. Hart, 182 N. Y. 330, 75 N. E. 404.
Miller vs. Crawford, 70 Ohio St. 207, 71 N. E. 631.
McKinster vs. Sager, 163 Ind. 671, 72 N. E. 854
Block vs. Schwartz, 27 Utah 387, 101 Am. St. Rep. 971, 65 L. R. A. 308.
Off & Co. vs. Morehead, 235 Ill. 40, 85 N. E. 264.

Statutes for the same general purpose have been held valid in Massachusetts, Tennessee, Washington, and Oklahoma, but the statutes of all those states are easily differentiated from the Michigan statute.

Squire & Co. vs. Tellier, 185 Mass. 18, 69 N. E. 312.
Neas vs. Borches, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50.

McDaniels vs. J. J. Connelly Shoe Company, 30 Wash. 549, 60 L. R. A. 347, 94 Am. St. Rep. 889.

Williams vs. Fourth National Bank, 82 Pac. 496 (Okla.) 2 L. R. A. (N. S.) 334.

In Wisconsin and Maryland, such statutes have been before the court, but the question of their constitutionality does not seem to have been raised.

Fisher vs. Herrman, 118 Wis. 424.
Hart vs. Roney, 93 Md. 432.

A statute of Connecticut, having but slight resemblance to the Michigan statute, was held valid by this Court in the case of *Lemieux vs. Young*, 211 U. S. 489, 53 Law. Ed. 295. The substance of the statute in question in that case was that a dealer should not sell his stock unless he should, not less than seven days previous to such sale, cause a notice of his intention to sell, to be filed in the town clerk's office, and that sales without such notice should be void as against the creditors of the vendor.

The Court was careful to say that IT IS APPARENT FROM THE MOST CASUAL INSPECTION OF THE OPINIONS OF THE COURTS OF THE STATES REFERRED TO THAT THE STATUTES THERE CONSIDERED, CONTAINED CONDITIONS OF A MUCH MORE ONEROUS AND RESTRICTIVE CHARACTER THAN THOSE WHICH WERE FOUND IN THE STATUTE THEN BEFORE THE COURT, AND THAT IT WAS NOT NECESSARY TO ANALYZE THE CASES WHICH HAD HELD BULK SALES ACTS UNCONSTITUTIONAL, OR TO INTIMATE ANY OPINION AS TO THE PERSUASIVENESS OF THE REASONING BY WHICH THE CONCLUSIONS EXPRESSED IN THEM WERE SUSTAINED.

We do not regard the decision in the Connecticut case as at all unfavorable to the plaintiff in error in this case, because THE STATUTE OF MICHIGAN IS FAR MORE ONEROUS AND RESTRICTIVE THAN THAT OF THE STATE OF CONNECTICUT. We think that on investigation this court will find the Michigan act, on the whole, MORE RESTRICTIVE AND ONEROUS IN CHARACTER THAN THAT OF ANY OTHER STATE, IN WHICH THE VALIDITY OF BULK SALES ACTS HAVE BEEN UPHELD BY THE HIGHEST COURT OF THE STATE.

Liberty and Property

Liberty of a citizen includes the right to acquire property, to own it, use it, buy it, or sell it, so long as his acts are without intent to defraud. When the owner is deprived of the right to sell property, he is deprived of the property itself, within the meaning of the constitution, by having one of the incidents of ownership taken away from him. When a person is deprived of the right to buy property, he is deprived of the liberty guaranteed by the constitution. The liberty mentioned in the Fourteenth Amendment means, not only the right of the citizen to be free from mere physical restraint, as by unlawful incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any calling or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to a successful conclusion of the purposes aforesaid.

Allgeyer vs. State of Louisiana, 165 U. S. 578, 41 Law. Ed. 833.
Butchers' Union, etc., Co. vs. Crescent City, etc., Co., 111 U. S. 746, 28 Law. Ed. 585.
Lochner vs. New York, 198 U. S. 53, 49 Law. Ed. 940.
In Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.
People vs. Gillson, 109 N. Y. 389, 17 N. E. 343.
Braceville Coal Company vs. People, 147 Ill. 66, 71, 35 N. E. 62.
Ritchie vs. People, 155 Ill. 98, 104, 40 N. E. 454, 29 L. R. A. 79.
Frorer vs. People, 141 Ill. 171, 31 N. E. 395.
Commonwealth vs. Perry, 155 Mass. 117, 28 N. E. 1126.
City of Cleveland vs. Clements Bros. Const. Co., 67 Ohio St. 197, 219, 65 N. E. 885, 59 L. R. A. 775.

We quote from the dissenting opinion of Wilkes, J., in the case of *Neas vs. Borches,* 109 Tenn. 398, 71 S. W. 50, as follows:

> "The effect of this act is not to take away the merchant's property, it is true, but it is to restrict and burden it in such manner as to prevent its free transfer and the realization of its full value. It takes away one element of its value, to-wit, the right to use and legitimately dispose

of it. As is said in *Bank vs. Divine Grocery Co.*, 12 Pickle 611:

> " 'To take from property its chief element of value and to deny to the citizen the right to use and transfer it in any proper and legitimate manner, is as much depriving him of his property, as if the property itself was taken.'
>
> "The object and purpose of the act is no doubt to prevent fraudulent sales of an insolvent merchant's property, or such sales when designed to prefer one or more creditors, but the act is not confined to such cases, either in its caption or body. While the equal or equitable distribution of a failing debtor's property and especially that of a failing merchant may be a laudable purpose, and one which the general assembly has, by more than one act, endeavored to secure, still it cannot be done at the expense of a violation of the fundamental law of the land."

We quote also from page 266 of 85 N. E., *Off & Co. vs. Morehead* supra:

> "The privilege of contracting is both a liberty and a property right, and a law which deprives a man or a class, of the right to acquire and enjoy property upon the same terms and in the same manner permitted to the community at large is in violation of the constitutional rights of the persons affected by such law."

The constitutional provisions against deprivation of property without due process of law were intended to secure individuals from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. The provision was intended to protect property from confiscation by legislative enactments, from seizure and forfeiture without a trial by the ordinary modes of judicial proceedings.

An act of the legislature which takes away a right by refusing a remedy in toto or except on impossible conditions, is as much a violation of the constitution as though the right were taken away in express terms.

Gilman vs. Tucker, 128 N. Y. 190, 26 Am. St. Rep. 464, 28 N. E. 1040.

We quote from the opinion in that case:

"It cannot be the subject of doubt that an act of the

legislature which provides for an involuntary transfer of property from one person to another without due process of law, whether with or without compensation, violates the principles of the fundamental law, whatever may be the pretext upon which it is founded." See page 469 of 26 Am. St. Rep. or page 1042 of 28 N. E.

Due Process of Law

The terms, "law of the land" and "due process of the law" do not mean merely an act of the legislature.

Board of Education vs. Bakewell, 122 Ill. 339, 10 N. E. 378.
Clark vs. Mitchell, 64 Mo. 578.
Calhoun vs. Fletcher, 63 Ala. 574.
Saco vs. Wentworth, 37 Me. 165, 58 Am. Dec. 786.

Certainly the law of the land does not mean merely an act of the legislature, for such a construction would abrogate all restrictions on legislative power.

10 Am. & Eng. Enc. of Law, 2d. Ed., 291, 292, Title *"Due Process of Law."*

Judge Cooley, referring to Webster's celebrated definition of the term "law of the land," says:

"It is correct, also, in assuming that a legislative enactment is not necessarily the law of the land."

Cooley's Constitutional Limitations, 6th Ed., 431.

Continuing, Judge Cooley quotes from Bronson, J., in *Taylor vs. Porter,* 4 Hill 140, 145, as follows:

"The words, 'by the law of the land' as used in the Constitution, do not mean a statute passed for the purpose of working a wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses:

" 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of the rights or privileges of a citizen unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.' "

If the term "due process of law" meant merely enactment

of the legislature, the words would render the constitutional guaranty mere nonsense, for it would then mean that no state shall deprive a person of life, liberty, or property, unless the state shall choose to do so.

In Re Siebold, 23 Fed. 791.

The Supreme Court of New Jersey has said:

"It may be impossible, it certainly would be presumptuous to frame a definition of 'due process of law' which shall embrace all and only all the cases which a just mind will perceive to be included in it; but if an enactment of the legislature which purports simply to strip a man of his right to protect his property be such process, the provision is not of sufficient value to warrant its insertion in the organic law." Quotation from page 562 of 39 Am. Rep.

Moore vs. State, 14 Vroom (43 N. J. L.) 203, 39 Am. Rep. 558.

The Supreme Court of Alabama has said:

"If life, liberty, and property could be taken away by the direct operation of a statute, the enjoyment of these rights would depend upon the will and caprice of the legislature, and the provision would be a mere nullity. Thus construed, the constitution would read,

" 'No person shall be deprived of his life, liberty or property unless the legislature pass a law so to do.'

A proposition so plain upon reason and principle hardly needs to be buttressed by authority. An act of the legislature is not, and nothing less than a regular judicial trial is, due course of law, within the meaning of this clause of the constitution."

Dorman vs. State, 34 Ala. 216.

Is the Legislation a Valid Exercise of the Police Power of the State?

If the statute only related to insolvent debtors or to debts due, or gave purchase-price creditors an equitable lien for their respective share of the proceeds, or if it made some reasonable provision for impounding the proceeds of the sale until the seller's obligations could be judicially determined, a different question would be presented.

It is submitted that there is no justification for this piece of legislation under the police power. The liberty guaranteed by the Constitution includes the right to pursue such avocation as the citizen may choose, subject only to such restrictions as may be necessary for the preservation of the public health, morals, safety and welfare, none of which powers authorize statutes such as the one before the court. To sustain an act under the police power, the court must be able to see that some or all of these objects are conserved and promoted. The individual may pursue without let or hindrance from any one all such callings as are innocent in themselves, and not injurious to the public. These are fundamental rights of all persons living under a free government.

It is manifest that the statute has no such effect as the preservation of the public safety or welfare, but under the guise of police regulation, is an INVASION OF THE PROPERTY RIGHTS OF THE INDIVIDUAL.

Chaddock vs. Day, 75 Mich. 527.
Matter of Frazee, 63 Mich. 396.
People vs. Gillson, 109 N. Y. 389, 17 N. E. 343.
In Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.
People vs. Marx, 99 N. Y. 377, 2 N. E. 29.
Fisher Co. vs. Wood, 187 N. Y. 90, 79 N. E. 836.
Gilman vs. Tucker, 128 N. Y. 190, 28 N. E. 1040.
People vs. Warden, 157 N. Y. 116, 51 N. E. 1006.
Lawton vs. Steele, 152 U. S. 133, 38 Law. Ed. 385.
City of Richmond vs. Southern Bell Telephone, etc., Co., 85 Fed. 19.
Chicago vs. Netcher, 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261.

The act has no support in this particular from the case of *Lemieux vs. Young*, supra. The statute involved in that case required only one thing, viz., that the seller should file notice of the intended sale in the town clerk's office seven days before the completion of the sale. The Michigan legislation requires a large number of acts to be performed by the buyer and seller which are vexatious and burdensome. Some of them are wholly FOREIGN TO THE OBJECT OF THE ACT and such as to constitute UNDUE RESTRAINT UPON TRADE, if not to practically PROHIBIT SALES ALTOGETHER.

Bulk sales statutes have been held not within the police power in the following cases:

Miller vs. Crawford, 70 Ohio St. 207, 71 N. E. 631.
McKinster vs. Sager, 163 Ind. 671, 72 N. E. 854.
Off & Co. vs. Morehead, 235 Ill. 40, 85 N. E. 264.
Wright vs. Hart, 182 N. Y. 330, 75 N. E. 404.

In the case last cited, Werner, J., said, (page 408 of 75 N. E.)

"But the police power only begins where the constitution ends. * * * * * * And when the exercise of the police power clearly infringes upon vested constitutional rights, courts should not concern themselves with the probable purposes for which it is exercised, or the evils which it was designed to correct. First, the constitution, and then the police power."

In *Miller vs. Crawford,* 70 Oh. St. 207, 71 N. E. 631, the Supreme Court of Ohio, in holding the statute of that state void, used this language (see page 632 of 71 N. E.):

"For every restriction upon the enjoyment and use of property there must be substantial reason of a public character, and, in order that the provisions of the Constitution may have their intended operation, the conclusion of the General Assembly in that regard is subject to review by the courts. If a restriction is placed upon the alienation of property, it must be for the benefit of either the entire body of the people, or at least of all who are within the reason of the restriction."

In *Off & Co. vs. Morehead,* 235 Ill. 40, 85 N. E. 264, the Supreme Court of Illinois said (see pages 266, 267 of 85 N. E.):

"It cannot be seriously contended that a creditor of a merchant occupies a position of such peculiar public concern that the passage of this act can be justified because of the inability of creditors of merchants to take care of themselves upon an equal footing with creditors of persons engaged in other lines of business. There is, furthermore, no reason pointed out, and none suggests itself to us, why sales of stocks of merchandise should be placed under the protection of a special statute imposing onerous restrictions and conditions upon both seller and buyer from which persons dealing in all other classes of property are exempt. This law has no application to a sale by a manufacturer of all his machinery, tools, finished articles and raw material; or by a farmer of all of his live stock, farm implements, crops grown or growing, and household goods; or by a hotel keeper of his entire bus-

iness and all the property therein; or by a livery or transfer company of all its rolling stock, harness, and horses owned and used in the business; or by a publisher of all his presses and printing machinery and appliances; or by a mine owner of all the property owned and used in the mining business; or to a sale by a miller who may sell his business, mill machinery, and the grain and its products on hand. On behalf of these and all others the law indulges the presumption of honesty and fair intentions in making sales, either in or out of the ordinary course of business, with or without an inventory, and in bulk or by parts and parcels. If sales made of the various classes of property above referred to are presumed to be fair and honest, it is difficult to see why a sale of a stock of merchandise under similar conditions should be presumed to be fraudulent and void."

Concerning the validity of "bulk sales statutes" under the police power, we again quote from the dissenting opinion of Wilkes, J., in *Neas vs. Borches,* 109 Tenn. 398, 71 S. W. 50:

"It has been said that it is difficult to define what objects fall within the exercise of the police power, and that this is a broad and comprehensive term, and embracing any measure affecting the public health, public morals, public safety, public welfare and other matters. But whenever it is called into exercise it is in aid or regulation of some matter of a public or quasi public character, or that affects and touches the public as a body politic."

Mayor and Aldermen vs. Knoxville Water Co., 23 Pickle 647.

"But I am of opinion that the police power cannot be so extended as to prevent the disposition of property in any manner the owner may see proper, so that such disposition does not endanger the public safety, peace, health, or happiness. It is to be observed that this act embraces all sales of merchandise, otherwise than in the ordinary course of trade, in the regular and usual prosecution of the seller's business, no matter whether the seller be solvent or insolvent, and no matter whether done in actual good faith or for a fraudulent purpose, and unless notice is given to all the creditors of the seller, the sale will be presumed to be fraudulent and held to be void. The practical effect is to compel every merchant whether solvent or insolvent, to obtain the consent of all his creditors before he can close out his business, for any purpose or at any price."

There is this important difference between the Michigan act and that of Tennessee, that the latter makes sales in which the statute is not followed only PRESUMPTIVELY fraudulent and void, while the Michigan act makes them ABSOLUTELY void. The statutes are alike in this, that under either, the practical effect is to compel every merchant, WHETHER SOLVENT OR INSOLVENT, to obtain the consent of all his creditors before he can close out his business for any purpose, or at any price.

The decisions cited from the state courts do not differ from the law as laid down by this court.

Slaughter House Cases, 16 Wallace 36, 21 Law. Ed. 394.
Lochner vs. New York, 198 U. S. 45, 49 Law. Ed. 937.
Davidson vs. New Orleans, 96 U. S. 97, 24 Law. Ed. 616.
Yick Wo vs. Hopkins, 118 U. S. 356, 30 Law. Ed. 220.
Hennington vs. State of Georgia, 163 U. S. 299, 303, 304, (41 Law. Ed. 166.)
Mugler vs. Kansas, 123 U. S. 623, 31 Law. Ed. 205.
State of Minnesota vs. Barber, 136 U. S. 313, 34 Law. Ed. 455, 458.

In the Lochner case, the court had under consideration a statute of the State of New York, limiting employment in bakeries to sixty hours per week and ten hours per day. The majority of this court, speaking through Mr. Justice Peckham, said concerning the police power (198 U. S. 56):

> "In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises:—Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.
> * * * * * * * * * * * *

"Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act.

* * * * * * * * * * * * *

"The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of the individual to be free in his person and in his power to contract in relation to his own labor."

The learned judge further pointedly said:

"Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed."

In *Lawton vs. Steele,* 152 U. S. 137, this court said:

"To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, requires such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not, unduly oppressive upon the individual. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts."

In the case of *Hennington vs. State of Georgia,* supra, it is said, on pages 303 and 304 of 163 U. S.:

"The well settled rule is that if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

It is submitted, that tested by the foregoing language, the act cannot be justified under the police power. The interests of the public generally are not conserved by the legislation. The means adopted are not reasonably necessary, or necessary at all, for the accomplishment of any public purpose. It is unduly oppressive upon individuals, and it is unfair and unjust and serves only to restrict and prohibit legitimate trade and business. If evils exist, let them be remedied by constitutional methods, and not by drastic and arbitrary means. Let honest men still have the right to buy and sell goods.

The Bulk Sales Statute of Michigan and the National Bankruptcy Law

By the national bankruptcy law it is provided that a person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of a petition in bankruptcy, made a transfer of any of his property, the effect of which will be to enable any one of his creditors to obtain a greater percentage of his debt than other creditors of the same class. It also provides that if the person receiving such preference shall have reasonable cause to believe that it was intended thereby to give a preference, such preference shall be voidable by the trustee in bankruptcy, and he may recover the property or its value from such person.

In this case Ford owed the plaintiff in error more than $400. Now let us suppose that Ford was insolvent at that time (as he probably was), and that the plaintiff in error knew it. The transfer would have been voidable by a trustee in bankruptcy, and he could have recovered the property, or its value, from Kidd, Dater & Price Company.

Nevertheless, if this statute is valid, A TRUSTEE OF FORD COULD NOT HAVE RECOVERED THE PROPERTY, OR ITS VALUE, IN CASE THE PLAINTIFF IN ERROR HAD COMPLIED WITH THE TERMS AND CONDITIONS OF THE ACT; because

the act declares that any purchaser who shall conform to its provisions SHALL NOT IN ANY WAY BE HELD ACCOUNTABLE to any creditor of the seller for any of the goods that have come into the possession of the purchaser by virtue of such sale. It is confidently submitted that a statute which attempts to nullify a substantial part of a valid Act of Congress, cannot be justified under the police power or under any other power of a state.

It may be said in reply that the enactment of a national bankruptcy law suspends all state laws in conflict therewith. If that be correct, then the statute of Michigan, even though it had been subject to no other objections, would still ever since its enactment, have been wholly inoperative, and would be WHOLLY INOPERATIVE NOW.

The act in question is substantially an insolvency law, and therefore of no effect when a national bankruptcy law is in force.

Sturges vs. Crowninshield, 4 Wheaton 122, 4 Law. Ed. 529.
Ogden vs. Saunders, 12 Wheaton 213, 6 Law. Ed. 606.
Tua vs. Carriere, 117 U. S. 201, 29 Law. Ed. 855.
1 Fed. Stat. Annot. 526, 527, notes.
Brandenburg on Bankruptcy, 3d Ed., sec. 16, and cases cited.

It is respectfully submitted, that there is manifest error in the record; that for the reasons aforesaid, Act No. 223 of the Session Laws of the State of Michigan for the year 1905 should be held to be violative of the Federal Constitution in the particulars aforesaid; that the judgment of the Supreme Court of the State of Michigan in this cause should be reversed, and final judgment should be entered in this Court in favor of the plaintiff in error and against the defendant in error with costs to be taxed.

Benton Harbor, Michigan, December 22, 1909.

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E. B. VALENTINE,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 149.

KIDD, DATER & PRICE COMPANY, PLAINTIFF IN ERROR,

vs.

MUSSELMAN GROCER COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF OF THE DEFENDANT IN ERROR.

SWAGAR SHERLEY, *Counsel.*

BENN M. CORWIN,
HENRY C. QUINBY,
Of Counsel.

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BRIEF OF THE DEFENDANT IN ERROR.

Statement of Case.

Plaintiff in error purchased a stock of goods from one Ford without complying with the provisions of act number 223 of the Public Acts of the State of Michigan for the year 1905 (commonly known as the Bulk Sales act). Defendant in error, being one of the creditors of Ford, brought suit against Ford and made plaintiff in error garnishee defend-

ant under the garnishment provisions of the State law (sections 10,601 and 10,602 of the Compiled Laws of the State of Michigan for the year 1907). Counsel for the garnishee, Kidd, Dater & Price Company, contended that the Bulk Sales act was unconstitutional, being in violation of both the constitutions of Michigan and the United States, and also that, if valid, a bill of equity for the appointment of a receiver was the proper procedure and that garnishment proceedings would not lie. The trial court overruled both contentions and instructed the jury to find a verdict for the Musselman Grocer Company (the defendant in error), and a verdict and judgment was so rendered. Upon appeal to the Supreme Court of Michigan this judgment was affirmed, the court holding that the Bulk Sales act was constitutional, but without discussion of that question, simply reaffirming their position as announced in the case of Spurr *vs.* Travis, 145 Mich., 721; and also holding that failure to comply with said act made the sale by Ford to Kidd, Dater & Price Company void as to creditors, and that garnishment under the provisions above noted was the proper procedure. From that decision this writ of error was issued and the plaintiff in error assigns some nine errors. These assignments are merely restatements of the propositions that the Bulk Sales act is repugnant to the Federal Constitution because wanting in due process of law and denying the equal protection of the laws, and not a valid exercise of the police powers of the State.

The Bulk Sales act (number 223, Public Acts of the State of Michigan for the year 1905) is as follows:

> "SECTION 1. The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller, transferor or assignor, shall be void as against the creditors of the seller, transferor, assignor, unless the seller, transferor, assignor and purchaser, transferee and assignee, shall

at least five days before the sale, make a full detailed inventory, showing the quantity and, so far as possible with the exercise of reasonable diligence, the cost price to the seller, transferor and assignor of each article to be included in the sale; and unless the purchaser, transferee and assignee demand and receive from the seller, transferor and assignor a written list of names and addresses of the creditors of the seller, transferor and assignor, with the amount of the indebtedness due or owing to each and certified by the seller, transferor and assignor, under oath, to be a full accurate and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee and assignee shall, at least five days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally or by registered mail, every creditor whose name and address are stated in said list, or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof.

"SECTION 2. Sellers, transferors and assignors, purchasers, transferees and assignees, under this act, shall include corporations, associations, copartnerships and individuals. But nothing contained in this act shall apply to sales by executors, administrators, receivers, trustees in bankruptcy, or any public officer under judicial process.

"SECTION 3. Any purchaser, transferee or assignee, who shall not conform to the provisions of this act, shall, upon application of any of the creditors of the seller, transferor or assignor, become a receiver and be held accountable to such creditors for all the goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale, transfer or assignment: Provided, however, That any purchaser, transferee or assignee, who shall conform to the provisions of this act shall not be held in any way accountable to any creditor of the seller, transferor or assignor, or to the seller, transferor or assignor for any of the goods, wares, merchandise or fixtures that have come into the possession of said purchaser, transferee or assignee by virtue of such sale, transfer or assignment."

ARGUMENT.

The exact questions raised in this case were presented and decided in the case of Lemieux *vs.* Young, 211 U. S., 489, relative to a similar statute of Connecticut, and we submit that unless it can be shown that the Michigan statute contains "conditions of a much more onerous and restrictive character" than those found in the Connecticut case the decision must here be as there, that the act is constitutional. The Connecticut law that was upheld is as follows:

> "SEC. 4868, as amended by Chapter 92 of the Public Acts of Connecticut of 1903. No person who makes it his business to buy commodities and sell the same in small quantities for the purpose of making a profit, shall at a single transaction, and not in the regular course of business sell, assign, or deliver the whole, or a large part of his stock in trade, unless he shall, not less than seven days previous to such sale, assignment, or delivery, cause to be recorded in the town clerk's office in the town in which such vendor conducts his said business, a notice of his intention to make such sale, assignment, or delivery, which notice shall be in writing describing in general terms the property to be sold, assigned, or delivered, and all conditions of such sale, assignment or delivery, and the parties thereto.
>
> "SEC. 4869. All such sales, assignments, or deliveries of commodities which shall be made without the formalities required by the provisions of sec. 4868 shall be void as against all persons who were creditors of the vendor at the time of such transaction."

Upon comparing this law with the Michigan statute it will be seen that they are alike in the following respects:

1. Their purpose is the same—*i. e.*, to prevent the defrauding of creditors by the secret sale of the whole or a part of a merchant's stock of goods in bulk.
2. Both require notice of such a sale.

3. Both make *void* as to the creditors a sale without notice.
4. Both require description of property to be sold and conditions of sale.

They differ in the following respects:

1. The Connecticut law relates only to retail merchants; the Michigan law relates to wholesale and retail merchants.
2. The Connecticut law requires notice to be filed in the town clerk's office; the Michigan law requires notice either personally or by registered mail to the creditors, and to this end requires that the seller, transferor, or assignor shall, under oath, certify to a full, accurate, and complete list of his creditors and of his indebtedness, and that the purchaser shall notify, personally or by registered mail, every creditor so certified, of the proposed sale and the conditions thereof.
3. The Connecticut law requires notice to be filed seven days prior to the sale, and the Michigan law requires five days before completion of sale, the purchaser shall notify personally or by registered mail, every creditor, &c.
4. The Connecticut law requires a description in general terms of the property to be sold; the Michigan law requires a full and detailed inventory showing the quantity and, so far as possible with the exercise of reasonable diligence, the cost price to the seller, transferor, and assignor of each article to be included in the sale.
5. The Michigan law provides that any purchaser not conforming to the provisions of the act shall, on application of any creditor of the seller, become a receiver and be held accountable to such creditors for all the goods, etc.; the Connecticut law simply states that failure to comply with the act shall make the sale void as against the creditors.
6. The Michigan law provides that upon compliance with the provisions of the act, a purchaser shall not in any way be held accountable to any creditor of the seller or to the seller for any of the goods so purchased; the Connecticut law is without any such provision.

Let us examine these various differences to ascertain whether the Michigan law imposes conditions so onerous or restrictive as to warrant this court in holding the act to be in contravention of the provisions of the Fourteenth Amendment. It is apparent that the statutes are alike in the broad

basic matters and unlike in the minor and incidental provisions. The object aimed at is the same and is clearly one calling for the exercise of police power by the State. The method for the accomplishment of that object is the same—the requiring of publicity, so far as creditors are concerned, of the actions of the seller and purchaser. The restrictions in both cases are confined to the sale of property *out of the usual course of business,* and only then where the seller is indebted to other persons. The provisions of both acts *can be avoided by the payment of his debts by the debtor* at the time of sale. In other words, neither law restricts the honest solvent seller of property.

An examination now of each difference pointed out will serve to show that in no case does the Michigan law place undue restriction upon the sale, and in some particulars it is even more liberal than the Connecticut law. It was urged in the Lemieux case with some force that the Connecticut law was unconstitutional because it applied only to a limited class of persons and, therefore, deprived such persons of the equal protection of the laws; that by its terms it was limited simply to retail merchants. This court, however, very properly considered that such classification was not unreasonable and was of the same nature as those that had been upheld many times by the courts. How much less unreasonable is a classification that applies to all merchants, whether wholesalers or retailers? In the first difference it is apparent, then, that the Michigan law is less subject to criticism than the Connecticut one.

While the second difference enumerated above, that relative to the manner of giving notice, at first sight would seem to impose upon the purchaser slightly more onerous provisions in the Michigan law than in the Connecticut, upon examination it will be found that in point of fact there is less likely to be a handicap placed upon a legitimate sale by giving notice to the creditors than by the filing of notice in the clerk's office, where the records are open to the entire public.

The Michigan law requires nothing of the debtor that he cannot properly perform, and it gives knowledge of his own affairs *only to those having a right to such knowledge.* It provides that the seller shall "at least five days before the sale make a full detailed inventory showing the quantity and, *so far as possible with the exercise of reasonable diligence,* the cost price to the seller." Manifestly it is in no sense difficult for a merchant to make inventory of his stock nor, ordinarily, to state the cost price of the articles composing such stock, but the law even in this matter has been carefully worded so as not to impose by any chance a hardship upon the seller and provides that such cost price shall be given only *so far as possible with the exercise of reasonable diligence.* Manifestly no sale would be made by a merchant of his goods in bulk without his knowing their quantity and value, and that no purchaser would buy in an honest transaction without similar knowledge. The requirement that a written list of names and addresses of the creditors of the seller should be given to the purchaser is also plainly reasonable. This knowledge is necessarily confined to the seller and it cannot be urged as unduly restrictive upon an honest merchant to require him to give to his purchaser a statement of such creditors, that he in turn may give them notice in order that no fraud may be practiced upon them. Only the man desiring to make a sale that would not stand the light of day could object. He is not notifying the public of the condition of his affairs as is the result of a compliance with the Connecticut statute, and yet this court has held that that requirement was not oppressive and unduly restrictive of the right of sale. Here, again, the Michigan law is more liberal than the Connecticut law.

The third distinction is one of time, and also the requirement in the Michigan law that the purchaser shall give notice to the creditors. The fact that but five days' notice is required in the one case and seven days in the other is again an illustration of the greater leniency of the Michigan law

as against the Connecticut, and the fact that the purchaser gives notice in lieu of the seller is immaterial, the statute making it the duty of the seller to furnish him with the necessary information. Manifestly under the Connecticut law no purchaser desiring to obey it would fail to personally see to it that the seller filed the notice in the clerk's office, and he cannot complain if he is given the right to send the notices under the Michigan law instead of the requirement being placed upon the seller. *It places within his own hands the certainty of a compliance with the act.*

It is urged that the difference pointed out in the fourth distinction above stated is one imposing impossible terms upon the seller, or at least terms so difficult of performance as to practically interfere with the honest disposition of property in bulk by the merchant. It is manifest that there is no basis for such a claim. As previously stated, every merchant of necessity would know the quantity and value of the goods that he was going to sell, and every honest purchaser would inform himself as to quantity and value before buying. To require an inventory is to ask no more than would be the actual and ordinary course in the case of every honest sale of any quantity of goods. Distinguished counsel for plaintiff in error states many imaginary cases of hardship, but the knowledge of the facts of every-day business life show them to be purely imaginary. The only merchant who can be unduly handicapped in the sale of his goods is the dishonest merchant, and it was to so handicap him that the law was passed. The honest merchant will find no difficulty in making proper sales under its requirements, and it is to be noted in this connection that Ford, the original debtor, did make a sale of a large part of his stock of goods in bulk to another purchaser *having first complied with all of the terms of the act.* In the face of this fact, the lengthy argument of counsel for plaintiff in error that such sales cannot and will not be made loses all force.

The fifth distinction is due simply to the fact that the Michigan statute is more detailed. Under the Connecticut

act the purchaser would hold the goods subject to the rights of all creditors and his title would practically be that of a receiver as declared in the Michigan law. In the Connecticut case the trustee in bankruptcy of the seller, acting on behalf of his creditors, replevied the goods in the hands of the purchaser. Similarly, under the Michigan law, such trustee could proceed in garnishment against the purchaser.

As a result of the sixth distinction, however, it is urged by the counsel that the present act is void. The Michigan law declares that upon a compliance with the terms of the act the purchaser shall not in any way be held accountable to any creditor of the seller or to the seller himself. Manifestly this is simply a declaration of the effect of the law, and it follows necessarily that if a failure to comply with the law shall make the purchaser liable to creditors when he would not otherwise be so liable, that a compliance with the law would relieve him of such liability. It is rather a curious spectacle to find a purchaser who knowingly does not comply with the requirements of the Michigan act, urging its unconstitutionality upon the ground that if he had complied with it he would have been protected from any claim on the part of any of the creditors of the seller. One might imagine a creditor making such a plea in a case where a purchaser had complied with the terms of the sale, but it is certainly unique to be confronted with a purchaser so solicitous of the creditor's rights that he urges the protection that the law gives him as a reason for holding such law invalid. It is apparent that what was intended by the Michigan act was that a creditor should have an opportunity to prevent a fraudulent sale of goods or to safeguard his rights as a creditor where an honest sale was contemplated, and that, if having full knowledge of the proposed sale he chose to remain silent, he should then be forced to look to his debtor for the payment of his debt and could not follow the property into the hands of the purchaser. That the creditor does not consider the act unduly burdensome upon him is best shown by the absolute absence of any complaint in this or

any other case that we have ever learned of under bulk sales law of the creditor complaining. It is urged, however, that under the Michigan law a single creditor, when the terms of the act are not complied with, may by garnishment obtain a preference over other creditors. It is a sufficient answer to this argument to state that the question of preferences between creditors under the law of Michigan is not involved here, and that with the present bankruptcy law in effect it is within the power of any creditor of the debtor to invoke the aid of the Federal court in the administration of the estate of such debtor so as to compel an equal distribution of his assets among all creditors. Here again the complainant in error seems to be particularly solicitous of the creditors of the debtor. Had he complied with the terms of the sale, as required by the act, all creditors of the debtor would have been by notice put upon an equal footing.

It is urged again and again by opposing counsel that if the act is complied with by giving of notice the sale cannot be set aside, even though it be in fact fraudulent, and that though such a sale be voidable under the bankruptcy law it could not be set aside if the Michigan law be held valid. We submit that there is nothing in the Michigan act that warrants such a conclusion. It is manifest that if there was a technical compliance with the act, but the sale was actually fraudulent, a court of equity would set it aside. The purpose of the act was not to make *fraudulent sales valid, but to prevent such sales.* If the sale be a valid one and notice be given, it is but right that a creditor having notice should look to the seller and the consideration given for the property, instead of seeking to hold the purchaser, and he can by appropriate proceeding at the time of sale protect his interests. And a trustee in bankruptcy could either prevent a sale or obtain the money or other consideration passing so as to subject it to the claims of creditors.

Equally unsound is the position that the act makes a five days' statute of limitation. If, as we have stated, there has

been an honest compliance with the law and the debtor has received all that the stock of goods is actually worth, there is no reason and no right for proceeding against the purchaser. Neither the seller nor purchaser has by his act injured any one. There has simply been a change in the form of the assets of the seller, and any creditor having a claim against such seller can proceed against him and subject his assets in their changed form to his claim.

The only case that we have been able to find that would in any way warrant the position of counsel for plaintiff in error is the case of Wright *vs.* Hart, 182 N. Y., 330, and it may not be amiss to briefly refer to that decision. In our judgment, the dissenting opinion of Justice Vann states the law more truly than the majority opinion, but considering alone the majority opinion it is plain that the reasons stated for that decision are either disposed of as unsound by this court in the Lemieux case or are based on provisions in the New York act not found in the Michigan act. The first ground stated by the court is that the act is class legislation because it relates only to merchants. The Lemieux case determines that point otherwise. The second ground is that the New York act distinguishes between sales of the entire stock and a portion of such stock, having as to the latter class only the requirement that it be contrary to the usual custom," etc. As the Michigan law requires both classes of sales to have been made out of the usual course of trade, the point is valueless here. So far as the New York court rejects the law because its applicability must be determined "on the shadowy question whether it is in the ordinary course of trade in the regular and usual conduct of the seller's business," it is in conflict with this court, for the Connecticut law is predicated on the same proposition.

Another ground stated is that under the New York law the purchaser must send the inventory to every creditor. While we do not believe a fair construction of the New York act requires that, it is clear that there are no such requi[illegible]ents

in the Michigan law. The requirement in the New York act, "that the seller shall at least five days before such sale file a truthful answer in writing to all inquiries," etc., is not found in the Michigan act.

So far as the New York decision urges the impossibility of sale under the law of that State without the seller first paying all his debts, it is sufficient to say that we do not believe the facts warrant the statement, and as to the Michigan law we know it is not true, for we have in this very record evidence of a sale made after compliance with the act. The vice of the New York decision, as of the argument of opposing counsel, lies in a false construction of the statutes and the creation of imaginary hardships upon the seller and purchaser.

While in our judgment the decision in the Lemieux case settles all questions here, we trust, in view of the citations in complainant's brief, we may be pardoned for further briefly presenting our position and citing other cases.

The Subject Dealt With is Within the Police Power of the State.

The purpose of this act is to regulate the manner of disposing of a stock of goods outside of the regular course of business, so as to prevent fraud upon and injury to the creditors of the seller. No clearer statement of the evils sought to be suppressed can be found than the following from the dissenting opinion of Justice Vann, of the New York Court of Appeals, in the case of Wright *vs.* Hart, 182 N. Y., 350, viz:

> "That evil is the tendency and practice of merchants who are heavily in debt to make secret sales of their merchandise in bulk for the purpose of defrauding creditors. Common observation shows that when a dealer has reached a point in his business career where he cannot go on, owing to the claims of his creditors, the temptation is strong, and the practice

common, of making a fraudulent sale. Fraud works in secret, and the bargain is closed and the purchaser in possession before the creditors know anything about it. The evil is difficult for the courts to handle, because the evidence to uncover the furtive scheme, must, as a rule, be drawn from hostile witnesses, usually relatives or intimate friends of the seller, who took part in the fraud and shared in the plunder. All those who have had to do with the investigation of such transactions realize how well these frauds are protected by the forms of law and how frequently they are defended by perjury."

That legislation for this purpose was necessary is best shown by the fact that forty (40) States and Territories and the District of Columbia have enacted laws dealing with such sales, and that such legislation is within the police power of the State the following cases of many may be cited, viz:

Lemieux *vs.* Young, 211 U. S., 489.
Squires & Co. *vs.* Tellier, 185 Mass., 18.
Spurr *et al. vs.* Travis *et al.*, 145 Mich., 721.
Neas *vs.* Borches, 109 Tenn., 398.
McDaniels *vs.* J. J. Connelly Shoe Co., 30 Wash., 549.

The Act Does Not Abridge the Privileges or Immunities of Citizens of the United States.

Slaughter House Cases, 16 Wall., 36-74.
Mugler *vs.* Kansas, 123 U. S., 623, and cases cited under following heads.

The Act Does Not Deprive Any Person of Liberty or Property Without Due Process of Law.

"Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes estab-

lished in the administration of government with respect to kindred matters."

Dent *vs.* West Virginia, 129 U. S., 124.
Barbier *vs.* Connolly, 113 U. S., 27.
Mugler *vs.* Kansas, 123 U. S., 623.
Holden *vs.* Hardy, 169 U. S., 366.
Knoxville Iron Company *vs.* Harbison, 183 U. S., 13.
Orient Ins. Co. *vs.* Daggs, 172 U. S., 557.

The Act is Not in Restraint of Trade.

The Michigan law does not interfere with sales made in the ordinary and usual course of trade, and it does not prevent the sale of goods in bulk, but only requires notice of such unusual sales. As was well said in the case of Squires & Co. *vs.* Tellier, 185 Mass., 18-20:

> "It does not interfere with the transaction of ordinary business but relates to unusual and extraordinary transfers. * * * The legislature, when contemplating this legislation, had occasion to consider and balance against each other the general right of property owners to make contracts and dispose of their property and the general right of creditors to be paid, and to have reasonable opportunities secured to them for the collection of their debts. That this is within a class of legislation for which there is constitutional authority is too plain for question."

> "It is within the undoubted power of Government to restrain some individuals from all contracts, as well as all individuals from some contracts." (Frisbie *vs.* United States, 157 U. S., 160-165.)

See also—

Plumley *vs.* Mass., 155 U. S., 461.
Nutting *vs.* Mass., 183 U. S., 553.
Soon Hing *vs.* Crowley, 113 U. S., 709.
Booth *vs.* Illinois, 184 U. S., 429.
Otis *vs.* Parker, 187 U. S., 606.
Jacobson *vs.* Mass., 197 U. S., 27.
Ah Sin *vs.* Williamson, 198 U. S., 500.
Reduction Co. *vs.* Sanitary Works, 199 U. S., 318.

The Act is Not a Denial of the Equal Protection of the Laws.

It is not a valid objection that a statute applies only to a particular class of transactions. Class legislation is not unconstitutional if it applies alike to all who are in the same situation, and if the classification is upon reasonable grounds.

Barbier *vs.* Connolly, 113 U. S., 27.
Soon Hing *vs.* Crowley, 113 U. S., 703.
Powell *vs.* Pennsylvania, 127 U. S., 678, 683.
Moore *vs.* Missouri, 159 U. S., 673, 677.
Achison & R. R. *vs.* Matthews, 174 U. S., 96, 103, and cases cited.
Frisbie *vs.* United States, 157 U. S., 160, 165.
United States vs. Joint Traffic Ass'n, 171 U. S., 505, 571.
Railway Co. *vs.* Mackey, 127 U. S., 204.
Minneapolis Railway Co. *vs.* Beckwith, 129 U. S., 26.

We respectfully submit that the judgment of the Supreme Court of Michigan should be affirmed.

SWAGAR SHERLEY,
Counsel for Defendant in Error.

BENN M. CORWIN,
HENRY C. QUINBY,
Of Counsel.

JUDD & DETWEILER, INC.,
PRINTERS,

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(21,154)

Supreme Court of the United States

October Term, 1909

No. 149.

KIDD, DATER & PRICE COMPANY,
Plaintiff in Error,
vs.
MUSSELMAN GROCER COMPANY,
Defendant in Error,

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF OF DEFENDANT IN ERROR.

BENN M. CORWIN,
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ONDERDONK, PRINTER, GRAND RAPIDS, MICH.

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STATEMENT OF CASE.

Broadly stated, the bill of exceptions in this case presents but a single question, viz: does act number 223 of the Public Acts of the State of Michigan for the year 1905, commonly known as the "Sales-in-Bulk Act," conflict with any of the provisions of the Constitution of the United States.

The act reads as follows:

An act to regulate the sales, transfers and assignments of stocks of goods, merchandise and fixtures, in bulk.

The People of the State of Michigan Enact:

Section 1. The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller, transferor or assignor, shall be void as against the creditors of the seller, transferor, assignor, unless the seller, transferor, assignor and purchaser, transferee and assignee, shall, at least five days before the sale, make a full detailed inventory, showing the quantity and, so far as possible with exercise of reasonable diligence, the cost price to the seller, transferor, and assignor of each article to be included in the sale; and unless the purchaser, transferee and assignee demands and receives from the seller, transferor and assignor a written list of names and addresses of the creditors of the seller, transferor and assignor, with the amount of indebtedness due or owing to each, and certified by the seller, transferor and assignor, under oath, to be a full, accurate and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee and assignee shall, at least five days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are in said list, or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof.

Section 2. Sellers, transferors and assignors, purchasers, transferees and assignees, under this act shall

include corporations, associations, copartnerships and individuals. But nothing contained in this act shall apply to sales by executors, administrators, receivers, trustees in bankruptcy, or by any public officer under judicial process.

Section 3. Any purchaser, transferee or asignee, who shall not conform to the provisions of this act, shall, upon application of any of the creditors of the seller, transferor, or assignor, become a receiver and be held accountable to such creditors for all the goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale, transfer or assignment: *Provided, however,* that any purchaser, transferee or assignee, who shall conform to the provisions of this act shall not in any way be held accountable to any creditor of the seller, transferor or assignor, or to the seller, transferor or assignor for any of the goods, wares, merchandise or fixtures that have come into the possession of said purchaser, transferee or assignee by virtue of such sale, transfer or assignment.

Nominally, the writ of error in this case was issued to permit a review of the decision of the Supreme Court of the state of Michigan in the case of *Musselman Grocer Company vs. Kidd, Dater & Price Company,* 151 Mich., 473; but, as the opinion in that case does not discuss the constitutionality of the act in question, except to refer to and affirm the previous decision of the same court, in the case of *Spurr vs. Travis,* 145 Mich., 721, this bill of exceptions really involves the correctness of the decision in the last mentioned case (R. 13), where the question of the constitutionality of this statute was passed upon (R. 13).

Plaintiff in error admits that it did not comply with the requirements of the statute (R. 3), therefore, if the

statute be not in conflict with the Constitution of the United States, the judgment of the Supreme Court of the state of Michigan must be affirmed.

Plaintiff in error purchased a stock of goods from one Ford, without complying with the provisions of the statute quoted above (R. 3). Defendant in error, being one of the creditors of Ford, brought suit against Ford, and made plaintiff in error garnishee defendant under the provisions of sections 10,601 and 10,632 of the compiled laws of the state of Michigan for the year 1897, which sections read as follows:

> Sec. 10,601. "From the time of the service of such writ, the garnishee shall be liable to the plaintiff to the amount of property, money, goods, chattels and effects under his control, belonging to the principal defendant, or of any debts due or to become due from such garnishee to the principal defendant, or of any judgment or decree in favor of the latter against the former, and for all property, personal and real, money, goods, evidences of debt, or effects of the principal defendant, which such garnishee defendant holds, by conveyance, transfer or title that is void as to creditors of the principal defendant, and for the value of all property, personal and real, money, goods, chattels, evidences of debt, or effects of the principal defendant, which such garnishee defendant received or held by a conveyance, transfer, or title that was void as to creditors of the principal defendant; and such garnishee defendant shall also be liable on any contingent right or claim against him in favor of the principal defendant."
>
> Sec. 10,632. "If any person garnisheed shall have in his possession any of the property aforesaid of

the principal defendant, which he holds by a conveyance or title that is void as to creditors of the defendant, or if any person garnisheed shall have received and disposed of any of the property aforesaid of the principal defendant, which is held by a conveyance or title that is void as to creditors of the defendant, he may be adjudged liable as garnishee on account of such property and for the value thereof, although the principal defendant could not have maintained an action therefor against him."

See record page 14.

It was contended by counsel for defendant in error that even if the statute was valid under the provisions of section three of the act in question, a bill in equity for the appointment of a receiver was the proper procedure.

The Supreme Court of Michigan held that the failure of the plaintiff in error, to comply with the provisions of Act 223 of the state of Michigan for the year 1905, rendered the sale void as to the defendant in error, and that garnishment under the provisions of sections 10,601 and 10,632 of the compiled laws of Michigan for the year 1897, was the appropriate remedy; and further, that it would destroy the intention of the legislature to require the intervention of a court of equity.

ARGUMENT.

That the subject of the statute in question, is one within the police power of the state, for the prevention of fraud, is no longer an open question.

The Connecticut statute involving the same subject matter, but containing slightly different regulations for its enforcement, was held constitutional in the case of *Lemieux vs. Young,* 211 U. S., 489; decided January 4, 1909; and unless it can be shown that, "The regulations in the Michigan statute, are so beyond all reasonable

relation to the subject to which they are applied, as to amount to mere arbitrary usurpation of power;" then the Michigan statute must also be declared valid, and a proper exercise of the police power of the state.

Nine errors are assigned upon the record (R. pp. 18, 19).

I.

The first is based upon the first section of the 14th amendment to the constitution of the United States and involves three prohibitions, namely; that no state shall make or enforce any law which,

(a) Abridges the privileges or immunities of citizens of the United States.

(b) That deprives any person of life, liberty or property without due process of law.

(c) That denies to any person the equal protection of the law.

(a) Abridgment of Privileges and Immunities.

It is claimed on the part of the plaintiff in error, that because the act in question, requires the owner of a stock of merchandise, or merchandise and fixtures, who desires to sell the same in bulk, or otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller, to take an inventory, furnish the purchaser with a written list of the names and addresses of all his creditors, the amount due each, and requires the purchaser to notify such creditors in person or by registered mail, of the intended sale and the terms thereof, at least five days before taking possession thereof or paying for the same; that said act abridges the privileges and immunities of citizens of the United States, by restricting the freedom of contract.

The question arises then, what are the privileges and

immunities, which are secured to the citizens of the United States by the fourteenth amendment?

The most concise, and still comprehensive definition of the terms privileges and immunities, is found in the case of *Corfield vs. Coryell,* 4 Wash. C. C., 371, 380-381, decided by MR. JUSTICE WASHINGTON, in 1823, and quoted with approval by MR. JUSTICE MILLER, in the *Slaughter-House Cases,* 83 U. S. (16 Wall.), 36, at page 76, where it is said:

"What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; *subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.*"

And again, in the case of *Crowley vs. Christensen,* 137 U. S., 86, at pages 89-90, MR. JUSTICE FIELD, said:

"The possession and enjoyment of all right are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. The right to acquire, enjoy and dispose of property is declared in the constitutions of several states to be one of the inalienable rights of man. But this declaration is not held to preclude the legislature of any state from passing laws respecting the acquisition, enjoyment and disposition of property. What contracts respecting its acquisition and disposition shall be valid and what void or voidable; when they shall be in writing and when they may be made orally; and by what instruments it may be conveyed or mortgaged are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not

impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non loedas* is a maxim of universal application.

For the pursuit of any lawful trade or business, the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business."

This same general rule is recognized by all the authorities.

Cooley's Constitutional Limitations (6th Ed.), 739-743.
Pool vs. Trexler, 76 N. C., 297.
State vs. Heinemann, 80 Wis., 253, 256.
Porter vs. Ritch, 70 Conn., 235, 254.
Commonwealth vs. Alger, 7 Cush., 53, 84-85.
Beer Company vs. Massachusetts, 97 U. S., 25, 32.
Mugler vs. Kansas, 123 U. S., 623, 665.
Ward vs. Farwell, 97 Ill., 593, 609.
St. Louis & San Francisco Ry. Co. vs. Mathews, 165 U. S., 1, 23.
Jacobson vs. Massachusetts, 197 U. S., 11, 26-27.

Judge Cooley in his work on Constitutional Law, 6th edition, page 743, lays down the following rule:

"The most proper business may be regulated to prevent its becoming offensive to the public sense of decency, or for any other reason injurious or dangerous; and rules for the conduct of the most necessary and common occupations are prescribed when from their nature they afford peculiar opportunities for *imposition and fraud.*"

It will be readily seen, therefore, that the provisions of the first section of the fourteenth amendment, do not guarantee to the individual citizen, the unqualified right to do as he chooses with his property, regardless of the rights of others; but such rights are subject to such reasonable restraint, under the Police Power of the state, as the law-making power may prescribe for the benefit of all the people.

Clearly, the *prevention of fraud,* is the benefit sought

to be secured to the people in the enactment of "Sales-in-Bulk" statutes.

In *Sampson vs. Brandon Grocery Co.*, 127 Ga., 454, 456, the court said, "The manifest purpose of the act was to prevent the commission of such frauds."

In the case of *McDaniels vs. Connelly Shoe Company*, 30 Wash., 549, the court had under consideration the constitutionality of a statute similar to the one now before this court. In writing the opinion, FULLERTON, J., said:

"Turning to the act before us, its purpose is plain. It was intended to prevent retail dealers in goods, wares, and merchandise from *defrauding* their creditors. * * * * It is well known that the business of retailing goods, wares and merchandise is conducted largely upon credit and furnishes an opportunity for the commission of frauds upon creditors not usual in other classes of business. In fact, charges of fraud made against retail dealers who have sold their stocks in bulk are among the most common with which the courts are called upon to deal."

In the case of *Lemieux vs. Young*, 211 U. S., 489, 493, this court also recognized the existence of the tendancy towards fraud in such transactions, and quoted with approval from the dissenting opinion of VANN, J., in the case of *Wright vs. Hart*, 182 N. Y., 330, 350, where it is said: "Twenty states, as well as the Federal Government in the District of Columbia, have similar statutes, some with provisions more stringent than our own, and all aimed at the suppression of an evil that is thus shown to be almost universal."

Since the foregoing language was written by Judge Vann, twenty other states and territories have passed similar statutes, making in all forty; leaving only eight states in the Union which do not have statutes regulating the sale of stocks in bulk. Namely; Alabama, Arkansas, Illinois, Iowa, Kansas, Missouri, South Dakota, and Wyoming.

The prevention of fraud being the acknowledged purpose of this statute, a few decisions sustaining the validity of analogous legislation for the prevention of fraud, in the sale of food and other articles may not be inappropriate.

In the case of *Commonwealth vs. Waite,* 93 Mass., 264. 265, the question was as to the constitutionality of a statute which prohibited the sale of milk to which water had been added. The court said:

"It is notorious that the sale of milk adultered with water is extensively practiced with a fraudulent intent. It is for the legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud, and to adapt the protection to the nature of the case. * * * The court can see no ground for pronouncing the law unreasonable, and has no authority to judge of its expediency."

In the case of *State vs. Campbell,* 64 N. H., 402, 403, the court said:

"Of the necessity of the statute the legislature is the *sole* judge. It clearly belongs to the class of police regulations designed to prevent fraud."

Statutes regulating the sale of poisons, intoxicating liquors, and articles of food made in imitation of other well known articles of food, are all statutes restricting the rights of owners in relation to the free use of their property, yet such statutes, in so far as they tend reasonably to prevent injury to the public, and fraud among individuals, are uniformly held constitutional.

State vs. Campbell, 64 N. H., 402, 403, and cases cited.
Booth vs. Illinois, 184 U. S., 425, 428-429.
Munn vs. Illinois, 94 U. S., 113, 125.
Otis vs. Parker, 187 U. S., 606, 608-609.
Jacobson vs. Mass., 197 U. S., 11, 26-27.
Commonwealth vs. Waite, 93 Mass., 264, 265.
Plumley vs. Mass., 155 U. S., 461, 468.

In the case of *Plumley vs. Massachusetts,* 155 U. S.,

460, the court had under consideration the validity of the statute of Massachusetts forbidding the sale of colored oleomargarine. MR. JUSTICE HARLAN, in delivering the majority opinion of the court, at page 479, said:

"The Constitution of the United States does not secure to any one the privilege of defrauding the public."

The act in question invades neither life, liberty nor property. It destroys no existing property, it deprives no one of the right to obtain an honest livelihood, and it curtails no one in the exercise of any right, except the right to make a secret sale, an act which, under ordinary circumstances, would only be done with a *fraudulent purpose.*

(b) DUE PROCESS OF LAW.

This statute affects all persons in Michigan, whether wholesaler or retailer, of any and every class of merchandise, or merchandise and fixtures, in exactly the same manner and degree; imposing restrictions upon the sale, in the exercise of the police power of the state, for the prevention of fraud. Plaintiff in error was not arbitrarily deprived of its property nor denied the equal protection of the laws.

Leeper vs. Texas, 139 U. S., 462.

In the last mentioned case, MR. CHIEF JUSTICE FULLER, delivering the opinion of the court, said:

"It must be regarded as *settled* * * * that law in its regular course of administration through the courts of justice is due process, and when secured by the laws of the state the constitutional requirements are satisfied; and that due process is so secured by laws operating on all alike."

In *Giozza vs. Tieman,* 148 U. S., 657, 662, the court said:

"The amendment (the 14th) does not take from the state those powers of police that were reserved at the time the original constitution was adopted. * * *

And *due process of law* within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to any arbitrary exercise of the power of the government."

New York & N. E. R. Co. vs. Town of Bristol, 151 U. S., 556, 567.
Duncan vs. Missouri, 152 U. S., 377, 382.
Hurtado vs. People of California, 110 U. S., 516, 535.
Lemieux vs. Young, 211 U. S., 489, 496.

(c) Equal Protection of the Law.

The objection that the statute is repugnant to that clause of the Fourteenth Amendment to the Federal Constitution, forbidding the denial by the state to any person within its jurisdiction, of the equal protection of the laws is untenable.

The statute places under the same restrictions, and subjects to like penalties and burdens, all persons who attempt to sell or purchase a stock of merchandise or merchandise and fixtures, in bulk, or otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller, thus recognizing and preserving the principal of equity among all those engaged in the same business.

Leeper vs. Texas, 139 U. S., 462, 468.
Powell vs. Commonwealth of Pennsylvania, 127 U. S., 678, 687.
Barbier vs. Connelly, 113 U. S., 27, 31.
Soon Hing vs. Crowley, 113 U. S., 703, 708-709.
Missouri Pacific Railway Co. vs. Humes, 115 U. S., 512, 523.
Missouri Pacific Railway Co. vs. Mackey, 127 U. S., 205, 209.
Spurr vs. Travis, 145 Mich., 721, 723.
Minneapolis and St. Louis R. Co. vs. Beckwith, 129 U. S., 26, 28-29-33.
Lemieux vs. Young, 211 U. S., 489, 496.

The Michigan statute applies with equal force to all

stocks of merchandise; no distinction being made between the retailer and the wholesaler. In the last mentioned case, however, the statute (public acts of Connecticut, Sec. 4868) is limited in its operation to "Persons who make it their business to buy commodities and sell the same in *small quantities* for the purpose of making a profit." A limitation not found in the Michigan statute, and yet this court in passing upon the question of the equal protection of the law, said, "As the statute makes a classification based upon a reasonable distinction, * * * there is no foundation for the proposition that the result of the enforcement of the statute will be to deny the equal protection of the law."

In *St. Louis & San Francisco R. Co. vs. Mathews,* 165 U. S., 1, Mr. Justice Gray, in delivering the opinion of the court said, at page 25, of the report:

"There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances,"

It is equally true that there is no evasion of the law of equality in the Michigan statute, relative to the selling of stocks of merchandise in bulk; it affects all persons alike. Unlike the Connecticut law, the validity of which has been sustained by this court, the provisions of the Michigan statute are not limited to persons who make it their business to buy commodities and sell the same in small quantities; nor like the Indiana statute which was limited in effect to merchandise creditors only, and was therefore held unconstitutional, in *McKinster vs. Sager,* 163 Indiana, 671. The Michigan statute is free from any of these objections.

II.

Due Process of Law.

The second assignment of error, is a repetition of the

second subdivision of the first assignment, and has been fully discussed under subdivision (b) of the first section of this brief.

Lemieux vs. Young, 211 U. S., 489, 496.

III.

DUE PROCESS OF LAW.

The third assignment of error, is but a repetition of the second stated in slightly different language, and requires no further discussion.

IV.

IMPAIRING THE OBLIGATION OF CONTRACTS.

The act in question does not impair the obligation of any contract. It simply requires notice of the intended sale to be given to all the seller's creditors. If he complies with the provisions of the act, he may complete the sale at the end of five days. The statute does not give the creditors any new or other right or remedy than they already possessed. The only thing taken from the seller is the opportunity to make a secret sale, which is usually done with the intent to defraud his creditors and secrete the proceeds of his property from them. The exemption laws have already supplied him with ample protection.

"By the obligation of a contract is meant the means which, at the time of its creation, the law affords for its enforcement."

Louisiana vs. Police Jury, 111 U. S., 716, 721.
United States vs. Quincy, 71 U. S., 535, 552.
Louisiana vs. New Orleans, 102 U. S., 203, 206

In the case of *N. O. Gas Light Co. vs. Louisiana Light Co.*, 115 U. S., 650, 672, MR. JUSTICE HARLAN, in delivering the opinion of the court said:

"The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the

power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are suject to regulations for the protection of the public health, the public morals and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations."

In the case of *Frisbie vs. United States*, 157 U. S., 162, 165-166, MR. JUSTICE BREWER, in delivering the opinion of the court, said:

"While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

United States vs. Joint Traffic Association, 171 U. S., 505, 572.
Williams vs. Fears, 179 U. S., 270, 274.
State vs. Allgeyer, 48 La. An., 104, 106-107.
Karnes vs. Insurance Co., 144 Mo., 413, 417.
Opinion of the Justices to the House of Representatives, 163 Mass., 589, 593.

In *Lehigh Water Co. vs. Easton*, 121 U. S., 388, 391, MR. JUSTICE HARLAN, delivered the opinion of the court. In referring to the provision of the constitution which declares that, "No state shall pass any law impairing the obligation of contracts," he said:

"The law of the state to which the constitution refers

in that clause must be one enacted *after* the making of the contract, the obligation of which is claimed to be impaired."

Clearly this provision of the constitution has no application in the present case where the statute in question was passed months before the contract was entered into.

V.

UNREASONABLE RESTRAINT UPON TRADE.

The fifth claim of plaintiff in error is that the statute in question is an "*unreasonable restraint upon trade,*" and therefore void and beyond the police power of the state.

It has long since been decided by the highest judicial authority, that the "*unreasonableness of a law*" is not a subject for judicial cognizance.

Missouri Pacific Railway Co. vs. Mackey, 127 U. S., 205, 208.
Missouri Pacific Railway Co. vs. Humes, 115 U. S., 512, 520.
Mugler vs. Kansas, 123 U. S., 632, 660-661.
Powell vs. Pennsylvania, 127 U. S., 678, 686.
People vs. Snowberger, 113 Mich., 86, 92.
People vs. Worden Grocer Co., 118 Mich., 604, 608-609.
Barton vs. McWhinnery, 85 Indiana, 481, 488.
Bertholf vs. O'Reiley, 74 N. Y., 509, 516.
Reeves vs. Corning, 51 Fed., 774, 787.
Territory vs. O'Connor, 5 Dakota, 397, 412.

A review of the foregoing authorities, would seem superfluous, were it not for the fact that so much stress was put upon this point, on the argument in the state court, by counsel for plaintiff in error.

In *Missouri Pacific Railway Co. vs. Mackey,* 127 U. S., 205, 208, this court said: "The hardship or injustice of the law of Kansas of 1874, if there be any, must be relieved by legislative enactment."

In the case of *Powell vs. Pennsylvania,* 127 U. S., 678,

the statute under consideration, was an act of the legislature of Pennsylvania, the first section of which prohibited the manufacture and sale of oleomargarine. The second section declared every sale of such article to be unlawful and void, and no action could be maintained to recover upon any contract for the sale thereof. Mr. Justice Harlan, delivered the opinion of the court, and in discussing the question of unreasonable restraint of trade, at page 686 of the opinion, said:

"If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the legislature, or to the ballot box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

The foregoing language is quoted with approval and followed in *Territory vs. O'Connor*, 5 Dakota, 397, 412.

The case of *People vs. Snowberger*, 113 Mich., 86, was a prosecution for the violation of a pure food statute. At page 92 of the opinion, it is said:

"The act may work hardship in many cases, but that question is one to be addressed to the legislature, and not to the courts."

In the case of *People vs. Worden Grocer Co.*, 118 Mich., 604, the validity of the Michigan pure food law was questioned by respondent, on the ground that it was unreasonable. At page 608 of the opinion, the court said:

"These questions might very properly be addressed to the legislature, but are matters with which the court has nothing to do. It is not a part of the functions of the court to investigate the facts entering into questions of public policy merely. Under our system, that power is lodged in the legislative branch of the government. It belongs to that branch to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

The case of *Barton vs. McWhinnery,* 85 Indiana, 481, involved the validity of the tax law of the state of Indiana, which provided for twenty-five per cent interest or penalty in case of a redemption from tax sales. The constitutionality of the law was assailed on the ground that the allowance was unreasonable and oppressive. At page 488 of the opinion, the court said:

"That, however, is not a subject for judicial cognizance; it is not for the court to say that a constitutional law shall not have effect, because it is in the judgment of the court, unreasonable."

The case of *Bertholf vs. O'Reilly,* 74 N. Y., 509, involved the constitutionality of the "Civil damage act" of that state. At page 516 of the opinion, it is said:

"We come back to the proposition that no law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the state, it is not justified by public necessity, or designed to promote the public welfare. We repeat, if it violates no constitutional provision, it is valid and must be obeyed. The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives, according to the method provided by the constitution."

In the case of *Reeves vs. Corning,* 51 Fed., 774, at page 787, the court said:

"The law making power must be the judge of the necessity of police regulations for any species of property. When it recognizes the necessity and applies the remedy, the law cannot be adjudged invalid, merely because it applies to a particular commodity, or to the sellers of the commodity."

VI.

Police Power.

The sixth objection raised by the assignment of error is, that, the statute in question is not a valid exercise of the police power of the state of Michigan.

The Michigan statute in all its provisions and requirements, is not essentially different in point or effect of its operation, than those of the Connecticut statute, which was held valid by this court in the case of *Lemieux vs. Young*, 211 U. S., 489. MR. JUSTICE WHITE, in delivering the opinion of the court, at page 496-497, said:

"As the subject to which the statute relates was clearly within the police powers of the state, the statute cannot be held to be repugnant to the due process clause of the 14th amendment, because of the nature or character of the regulations which the statute embodies, unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power."

See also,

Lawton vs. Steele, 152 U. S., 133, 136.
Booth vs. Illinois, 184 U. S., 425, 429.
Holden vs. Hardy, 169 U. S., 366, 392.

VII.

MAKES ORDINARY TRANSACTIONS FRAUDULENT AND VOID.

The objection that the statute is void because by its terms, it makes ordinary business transactions which by the law are presumably valid, conclusively dishonest, fraudulent and void is equally untenable.

The statutes of every state contain many instances of laws which prohibit, and even punished as criminal, acts which in themselves are innocent and free from any element of crime.

In the case of *People vs. West*, 106 N. Y., 293, decided in 1887, the court at page 296, of the opinion, said:

"It is not a good objection to a statute prohibiting a particular act, and making its commission a public offense, that the prohibited act was before the statute lawful, or even innocent, and without any element of moral turpitude. It is the province of the legislature to determine, in the interest of the public, what shall be

permitted or forbidden, and the statutes contain very many instances of acts prohibited the criminality of which consists solely in the fact that they are prohibited, and not at all in their intrinsic quality."

Again, in the case of *Lawton vs. Steele,* 152 U. S., 143, decided by this court in 1893, MR. JUSTICE BROWN, in writing for the court at page 143 of the opinion, said:

"The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question."

Lawton vs. Steele, 119 N. Y., 226, 233.
Commonwealth vs. Huntley, 156 Mass., 236, 241.
Commonwealth vs. Waite, 11 Allen (Mass.), 264, 265.

VIII.

DOES NOT OFFEND ANY PROVISION OF THE FEDERAL CONSTITUTION.

Plaintiff's eighth assignment of error, if not already covered, is too general in its terms to require any consideration. This court has frequently held that only such questions as are specified in the assignment of error, are to be regarded as open to the plaintiff.

Surely such an assignment of error does not specify or point out any error for discussion.

IX.

DECISION FOR THE WRONG PARTY.

The ninth assignment of error is also too general to present any question for decision. In the case of *Scholey vs. Rew,* 23 Wall. (90 U. S.), 331, 345, MR. JUSTICE CLIFFORD, in commenting on the proper form of assignments of error, said:

"Such questions only as are specified in the assignments of error are, in general, to be regarded as open to the plaintiff, and it is very doubtful whether an assignment that the decision of the Circuit Court is for the

wrong party is sufficient to present any question for decision."

X.

A Review of Statutes and Decisions Regulating the Sale of Stocks of Goods in Bulk.

The existence of an evil, so universal as to challenge the attention of almost every legislative body in the country, cannot be passed lightly by. The remarks of Mr. Justice Earl, in the case of *People vs. Arensberg*, 103 N. Y., 388, 394, in discussing the necessity of legislation to prevent fraud in the sale of food products, that, "The legislature has attempted to keep pace with the devices of men to circumvent its policy," applies with equal force to the legislation under consideration.

Forty-one states and territories, together with the District of Columbia, have passed statutes regulating the sale of stocks of goods in bulk.

These statutes may be divided into five groups or classes.

First. Arizona, California, Connecticut, and the Ohio statute of 1908, each requires notice of the proposed sale to be recorded, some in the office of the town clerk and others in the county recorder's office; California, five days, Connecticut and Ohio, seven days, and Arizona, ten days, before completing the sale. Such provisions have been held valid and proceedings under them sustained in the following cases:

Calkins vs. Howard, 2 Cal. App. Rep., 233.
Walp vs. Moore, 76 Conn., 515.
Spencer vs. Broughton, 77 Conn., 38.
In re Paulis, 144 Fed., 472 (Conn.).
Young vs. Lemieux, 79 Conn., 434.
Lemieux vs. Young, 211 U. S., 489.

Second. In the District of Columbia, Florida, Idaho, Kentucky, Maryland, New Hampshire, New Jersey, New York (new), Oregon, Pennsylvania, Rhode Island, Texas,

West Virginia, and Wisconsin, fourteen in all, the general provisions of the statutes may be stated as follows: The purchaser is required to demand and receive of the seller a list of the names of his creditors with their addresses and the amount due each; and the purchaser is required to notify each creditor of the terms and conditions of the sale, either personally or by registered mail, in some states five days, and in some states ten days, before the sale is completed, otherwise the sale is declared to be either void, presumptively void, or conclusively presumed to be void.

Three of these statutes have been construed and enforced without reference to their constitutionality in the following cases:

Hart vs. Roney, 93 Md., 432.
Wilson vs. Edwards, 32 Pa. Sup. Ct., 295.
Fiengold & Co. vs. Barsh & Co., 33 Pa. Sup. Ct., 39.
Fisher vs. Herrmann, 118 Wis., 424.

Third. Colorado, Delaware, Georgia, Michigan, Indiana (new), Maine, Massachusetts, Minnesota, Mississippi, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Virginia, and Vermont, eighteen in all.

In each of these states, the statute in force contains substantially the same provisions as those in the second group, and in addition to the requirements of the statutes in the second group, requires an inventory to be taken at **the cost price or at the prevailing wholesale price**, and notice to be given in person or by registered mail, as in the second group, otherwise the sale to be void, or fraudulent and void, or presumed to be fraudulent and void, or conclusively presumed to be fraudulent and void, as the case may be.

The constitutionality of six of this group of statutes, all containing substantially the same provisions as the

Michigan statute now under consideration, has been upheld in the following cases.

Spurr vs. Travis, 145 Mich., 721.
Musselman Grocer Co. vs. Kidd, Dater & Price Co., 151 Mich., 478.
Squire vs. Tellier, 185 Mass., 18.
Thorpe vs. Pennock, 99 Minn., 22.
Jaques & Tinsley Co. vs. Carstorphen Warehouse Co., 131 Ga., 1.
Williams vs. Fourth National Bank, 15 Okla., 477.
Neas vs. Borches, 109 Tenn., 398.

In addition to the foregoing cases which have passed directly upon the validity of these statutes, the following cases have been decided, in which their validity has been assumed without question.

Wasserman vs. McDonnell, 190 Mass., 326.
Kelley-Buckley Co. vs. Cohen, 195 Mass., 585.
Hart vs. Brierley, 189 Mass., 598.
Hannah & Bogg vs. Brewing Co., 149 Mich., 220.
Farrar vs. Lonsby Lumber Co., 149 Mich., 118.
Pierson & Hough Co. vs. Noret, 154 Mich., 268.
Bixler vs. Fry, 122 N. W. (Mich.), 119.
Carstorphen vs. Fried, 124 Ga., 544.
Parham & Co. vs. Potts-Thompson Liquor Co., 127 Ga., 303.
Sampson vs. Brandon Grocery Co., 127 Ga., 454.
Taylor vs. Folds, 58 S. E. (Ga.), 683.
Gilbert vs. Gonyea, 103 Minn., 459.
Kolander vs. Dunn, 95 Minn., 422.

Fourth. Montana, Nevada, Washington, and Utah, statute of 1905, each requires the purchaser to demand a sworn statement containing a list of the seller's creditors, and provides that all sales in bulk, shall be void unless the purchaser shall pay or see to it that the purchase money of said property is applied to the payment of all bona fide claims of the creditors of the vendor, share and share alike.

The provisions of the Washington statute, which are far more onerous and restrictive than the Michigan

statute now under consideration, in that it compels the payment of the Vendor's debts, or a pro rata distribution of the proceeds, has been upheld in the case of *McDaniel vs. Connelly Shoe Co.*, 30 Wash., 549, which has become a leading case on the subject of bulk sales.

The following cases, in the state and federal courts, have been decided under this statute:

In re Gaskill et al., 130 Fed. (Wash.), 235.
Fitz Henry vs. Munter, 33 Wash., 629.
Kohn vs. Fishback, 36 Wash., 69.
Plass vs. Morgan, 36 Wash., 160.
Holford vs. Trewella, 36 Wash., 654.
Seattle Brewing, etc. Co. vs. Donofrio, 34 Wash., 18.
Albrecht vs. Cudihee, 37 Wash., 206.
Everett Produce Co. vs. Smith Bros., 40 Wash., 566.

Fifth. The Louisiana statute makes it a misdemeanor to purchase goods on credit and sell or otherwise dispose of them out of the usual course of business, with intent to defraud, and also for a purchaser to purchase a stock of goods in bulk without first obtaining a sworn statement from the vendor that the same are paid for.

Under this statute a conviction for fraud was sustained in *State vs. Artus*, 110 La., 441.

XI.

Laws Held Unconstitutional.

Counsel for plaintiff in error make a mistake in stating that the statute of Virginia has been held invalid. Out of all the cases decided under statutes regulating the sales of stocks in bulk, only five have held statutes invalid. They are as follows:

Off vs. Morehead, 235 Ill., 40.
McKinster vs. Sager, 163 Ind., 671.
Wright vs. Hart, 182 N. Y., 332.
Miller vs. Crawford, 70 Ohio St., 207.
Block vs. Schwartz, 27 Utah, 387.

The statute in each of these cases, are easily distinguishable from the Michigan statute now under consideration. For example, the Indiana statute provided that the sale should be void as to "*merchandise creditors*" only. It was therefore held to be class legislation. At pages 682 and 685 of the opinion in *McKinster vs. Sager* (163 Ind., 671), the court said, "The enactment is vicious in respect to the classification of creditors (682). * * * In its last analysis, the act is objectionable in that its classification as to the remedy of an action is *too* narrow (685)." The Michigan statute is not open to this objection.

Following this decision of the court, the legislature of Indiana passed an act which is an exact copy of the Michigan statute now under consideration.

The distinction between the Utah statute and the Michigan statute, is clearly pointed out by Mr. Justice Montgomery in *Spurr vs. Travis*, 145 Mich., 721, 725. And again by the Supreme Court of Utah in the case of *Block vs. Schwartz*, 27 Utah, 387, where the court at page 408, recognized the validity of the Washington statute and the correctness of the decision in *McDaniels vs. Connelly Shoe Co.*, 30 Wash., 549. Further distinguishing the statute in that case, the court said:

"Nor, for the reasons given, can *any one* of the cases, from the several states referred to, be relied upon as controlling authority in this case."

Relying on this decision, the legislature of Utah subsequently passed an act which is substantially a copy of the Washington statute.

A statute like that of Michigan in all its material requirements, was held constitutional in the case of *Jaques & Tinsley Co. vs. Carstorphen Warehouse Co.*, 131 Ga., 1. In an exhaustive and well considered opinion the court reviews and distinguishes the statutes passed upon

in the cases of *Wright vs. Hart,* 182 N. Y., 322, and *Miller vs. Crawford,* 70 Ohio St., 207, from the Georgia statute. It must be conceded therefore, that the great weight of authority sustains the validity of statutes containing provisions like those in the statute in question, and the statutes which have been held void are easily distinguishable.

XII.

Reply to Brief of Plaintiff in Error.

On pages 11 and 12 of brief for plaintiff in error, it is claimed that a duplicate of the inventory "down to each paper of pins" must be served on each creditor. No reasonable construction of the language of the statute could give anyone such an idea. The statute only provides that the creditors shall be notified "of the proposed sale and of the price, terms and conditions thereof."

On page 17 it is argued that the last clause of section 3 of the Michigan statute validates sales that are made with the intention to defraud creditors. The wording of the statute does not justify such interpretation. The Supreme Court of Connecticut in the case of *Spencer vs. Broughton,* 77 Conn., 38, at the bottom of page 41, said: "The purpose of the provisions of section 4868, * * * was to prevent fraud, not to render sales lawful which were before deemed fraudulent."

Again, at top of page 18, it is argued that if the provisions of the statute are followed, all right of action against the vendor is suspended. There is no foundation for such an interpretation. The statute in question neither gives nor takes away any remedy or right which the creditor or debtor previously possessed, except the right of the debtor to make a secret sale and thus prevent the creditor from enforcing the remedies which previously existed.

The right to bring the ordinary action of assumpsit or to replevy goods fraudulently purchased, or to attach, is neither taken away nor enlarged.

Another glaring inconsistency in the brief for plaintiff in error appears on pages 18 and 19. At the top of page 18, it is argued that the statute suspends *all* right of action for five days, and at the bottom of page 19, it is argued that the statute is a five-day statute of limitation in which action may be brought.

We do not know which horn of the dilemma counsel will grasp on the oral argument, but the statute is not open to either construction.

Numerous other strained and distorted constructions are to be found in the brief for the plaintiff in error which we do not deem it necessary to point out and review in our brief. The frequency with which the provisions of such statutes are called into operation and their validity called in question, are but striking illustrations of their necessity as police regulations for the prevention of fraud.

Conclusion.

In conclusion we maintain that this honorable court has already passed upon the question involved in this case and recorded its decision in favor of the constitutionality of so-called "Sales-in-Bulk" laws, in the decision of *Lemieux vs. Young,* 211 U. S., 489, even to the extent of quoting a large portion of its opinion from the dissenting opinion of Judge Vann in the case of *Wright vs. Hart,* 182 N. Y., 332, 351, in which dissenting opinion he upheld the validity of the New York statute containing much more rigid provisions than the statute now under consideration.

By the decision in the case of *Lemieux vs. Young, supra,* the only question left open for discussion, is

whether the regulations contained in statutes relative to the sale of stock in bulk are so beyond all reasonable relation to the subject-matter as to amount to an arbitrary usurpation of power. The Michigan statute is not subject to such objection.

One of the chief objections made to these statutes is the delay caused by their requirements. The Connecticut statute requires the notice to be recorded seven days, while the Michigan statute only requires notice to be sent five days before consummating the sale.

Surely, the requirement of sending notice to each creditor by registered mail instead of recording it in the office of the township clerk, will not invalidate an otherwise constitutional law.

Of the necessity for such regulations for the prevention of fraud, the legislature is the sole judge.

We submit, therefore, that the judgment of the Supreme Court of Michigan should be affirmed.

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Defendant in Error.